1879

C 33 16

Motion to dismiss Oct 29/79

Apne 22/82

TRANSCRIPT OF RECORD.

affd

SUPREME COURT OF THE UNITED STATES.

No. 273.

Held

~~Dismissed~~

BAR ASSOCIATION

THE MASON LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

Robt Hamilton Merts R.

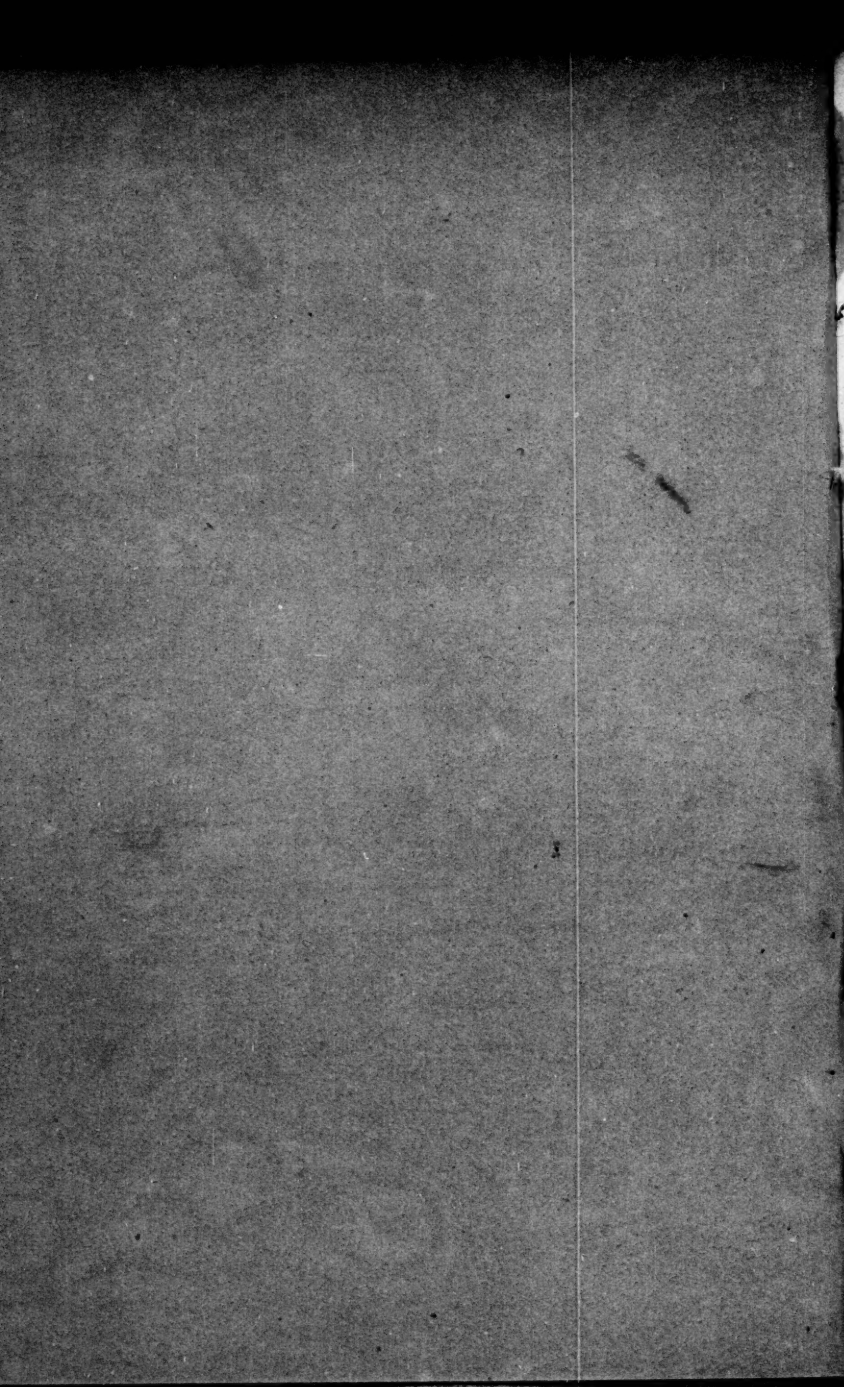
WILLIAM BUCHTEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 12, 1877.

Vernle Mohon - The case really involves the whole mortgage money for if suit on this instalment stands it includes the right in error from even disputing the remaining instalments upon the same grounds as here - See case 274 referred to in Stone's brief p. 9 point 4 -

In any event goes too near the merits to dismiss on motion



SUPREME COURT OF THE UNITED STATES.

No. 273.

THE MASON LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM BUCHTEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	2
Bond	5	2
Declaration	8	4
Amended plea	23	8
Order of reference	27	10
Judgment	29	10
Bill of exceptions	35	13
Opinion denying motion for new trial	189	65
Certificate of clerk	192	66

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between William Buchtel, plaintiff, and the Mason Lumber Company, defendant (said cause being numbered 791 in said circuit court), a manifest error hath happened, to the great damage of the said The Mason Lumber Company, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan.

Allowed by--

S. L. WITHEY,
Dist. Judge.

2 WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that a copy of the foregoing writ of error was lodged in the office of the clerk of the circuit court of the United States for the western district of Michigan, for the said William Buchtel, on the 3d day of February, 1877.

Dated Feb'y 3d, 1877.

CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States for the Western District of Michigan,
By A. B. CARRIER, *Dep.*

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that the copy of the writ of error above mentioned was on the 3d day of February, A. D. 1877, delivered to Omar H. Simonds, esq., one of the firm of Taggart, Simonds & Fletcher, who were attorneys in said circuit court for said William Buchtel, in the cause mentioned in the within writ of error.

Dated February 3d, 1877.

CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States for the Western District of Michigan,
By A. B. CARRIER, *Deputy.*

(Indorsed:) U. S. Supreme Court. The Mason Lumber Co., pl'ff in error, vs. William Buchtel, def't in error. Writ of error.

3 UNITED STATES OF AMERICA, *ss:*

To William Buchtel, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1877, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein the Mason Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this third day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

S. L. WITHEY,
District Judge of the United States for the Western District of Michigan.

4 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Jacob Kleinhaus, being duly sworn according to law, deposes and says that on the 3d day of February, 1877, he served upon Messrs. Taggart, Simonds & Fletcher, attorneys of record for the within-named William Buchtel, in the cause lately pending in the circuit court of the United States for the western district of Michigan, referred to in the within citation, a true and compared copy of said citation, by delivering the same to Omar H. Simonds, one of the members of said firm of Taggart, Simonds & Fletcher, and at the same time I showed him this original citation under the signature of the United States district judge within named.

JACOB KLEINHAUS.

Subscribed & sworn to before me this 3d day of February, 1877.

CHESTER B. HINSDILL,
U. S. Commissioner in & for Western District of Michigan.

4½ (Indorsed:) U. S. Supreme Court. The Mason Lumber Company, pl'ff in error, vs. William Buchtel, def't in error. Citation & proof of service.

5 Know all men by these presents that we, The Mason Lumber Company, a corporation organized, created and doing business under and in pursuance of the laws of the State of Michigan, and having its principal office for the transaction of business at the city of Muskegon, in said State, as principal, and Lyman G. Mason and Charles S. Davis, of said city of Muskegon, as sureties, are held and firmly bound unto William Bucktel, of Akron, in the State of Ohio, in the full and just sum of seven thousand five hundred dollars, to be paid to the said William Buchtel, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 3d day of

February, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at a session of the circuit court of the United States for the sixth circuit and western district of Michigan, in a suit depending in said court wherein said William Bucktel was plaintiff and
6 the said Mason Lumber Company was defendant, judgment was rendered in favor of William Buchtel and against the said Mason Lumber Company, for the sum of three thousand six hundred and sixty-seven & $\frac{59}{100}$ dollars, together with his costs and charges to be taxed; and the said The Mason Lumber Company having obtained a writ of error to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment rendered in the aforesaid suit, and a citation directed to the said William Bucktel, citing him to be and appear at the Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the second Monday in October, in the year of our Lord one thousand eight hundred and seventy-seven:

Now, therefore, the condition of this obligation is such that if the said The Mason Lumber Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE MASON LUMBER COMPANY,
By L. G. MASON,
President.

{ MASON LUMBER COMPANY, MUSKEGON, MICHIGAN. }

LYMAN G. MASON. [L. S.]
CHARLES S. DAVIS. [L. S.]

Attest:

THOMAS MONROE,
Sec'y.

7 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Lyman G. Mason and Charles S. Davis, being each duly sworn, severally depose and say, each for himself and not one for the other, that they are the sureties named in and by whom the foregoing bond was executed; and they further say that they are severally worth the sum of eight thousand dollars in property subject to execution, after the payment of all their just debts and liabilities.

LYMAN G. MASON.
CHARLES S. DAVIS.

Subscribed & sworn to before me this 11th day of January, 1877.
ISAAC H. PARRISH,
U. S. Commissioner in and for Western District of Michigan.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby approve of the foregoing bond in its form, amount, and sufficiency of the sureties by whom it is executed, and as good and sufficient security for a supersedeas bond under the statute.

Dated February 3d, 1877.

S. L. WITHEY,
District Judge of the United States for the Western District of Michigan.

(Indorsed:) U. S. circuit court for the west. dist. of Michigan. Will-

iam Bucktel vs. The Mason Lumber Co. Supersedeas bond. Filed Feb'y 3, '77. Chester B. Hinsdill, clerk.

8 The circuit court of the United States for the sixth circuit and western district of Michigan.

UNITED STATES OF AMERICA,
Western District of Michigan, ss :

William Buchtel, of the city of Akron, in the State of Ohio, who is a citizen of Ohio, the plaintiff in this suit, by Taggart, Simonds and Fletcher, his attorneys, complains of the Mason Lumber Company, a corporation found existing and doing business under and in pursuance of the laws of the State of Michigan, which is a citizen of the State of Michigan, the defendant herein, in a plea of trespass on the case upon promises, filing this declaration as commencement of suit according to the form of the statute authorizing the commencement of suits by declaration.

For that whereas, heretofore, to wit, on the twenty-third day of September, A. D. 1874, to wit, in the said western district of Michigan, the said plaintiff entered into a written contract and agreement with an incorporated company, incorporated under the laws of the State of
9 Michigan, and named the Big Rapids Improvement and Manufacturing Company, in and by which the said Big Rapids Improvement and Manufacturing Company promised and agreed to pay to the said plaintiff the sum of twelve thousand two hundred and seventy-three & $\frac{84}{100}$ dollars, as follows: Three thousand and sixty-eight & $\frac{46}{100}$ dollars on the first day of January next, after the said twenty-third day of September, A. D. 1874, and interest thereon at ten per cent., and the balance in three equal annual payments, the first annual payment to be made on the 23d day of September, A. D. 1875, with interest from the said 23d day of September, A. D. 1874, to be paid on the 23d day of September in each year on the whole sum remaining due or unpaid in each year, at the rate of seven per centum; and in consideration of said agreements and other promises of the said Big Rapids Improvement and Manufacturing Company, the said plaintiff in said contract and agreement agreed to sell to the said Big Rapids Improvement and Manufacturing Company all those certain pieces or parcels of land situate, lying and being in the county of Missaukee, in the State
10 of Michigan, which are known and described as follows, to wit: The northeast quarter and the north half of the northwest quarter of section eighteen; also, the southeast quarter and the northeast quarter of the southwest quarter of section eight (8); also, the west half of the southwest quarter, the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section twenty-four (24), and all in township twenty-one (21) north, of range seven (7) west, containing six hundred and eighty one & $\frac{88}{00}$ acres of land according to United States survey, be the same more or less, and upon the payment of the sum of money above specified at the time and in the manner above set forth, and the performance of the other covenants of the said Big Rapids Improvement and Manufacturing Company, set forth in said contract to execute, or cause to be executed, to the said Big Rapids Improvement and Manufacturing Company, a good and sufficient warrantee deed of the lands above described, so as to convey the same
11 in fee simple, free from incumbrances, to said Big Rapids Improvement and Manufacturing Company, subject, however, to

all taxes, assessments and liens, or titles thereunder, which should accrue or be levied after the said 23d day of September, A. D. 1874, and subject to all liens and transfers made by the said Big Rapids Improvement and Manufacturing Company, its successors or assigns; and it was further agreed in said contract that no timber should be cut or removed from said lands without the written permission of the said plaintiff endorsed on the said contract.

And plaintiff avers that afterwards, to wit, on the 25th day of September, A. D. 1874, to wit, at the city of Muskegon, in said western district of Michigan, the said Big Rapids Improvement and Manufacturing Company, for and in consideration of the sum of one dollar and other valuable considerations assigned by an instrument in writing of that date the contract above mentioned to the said Mason Lumber Company, the defendant above named, and in consideration of
12 the said assignment, and of the said plaintiff's assenting to the same, and giving to the said Mason Lumber Company permission to enter upon, cut and remove the timber upon the lands described in said contract, the said defendant by an agreement in writing bearing date the day and year last aforesaid, there guarantied the payment of the sum of money specified in the contract above mentioned, according to the tenor and effect of the said contract, if the said Big Rapids Improvement and Manufacturing Company should not so pay the same.

And plaintiff avers that the said Mason Lumber Company was on and before the said 25th day of September, A. D. 1875, and ever since has been, and still is a corporation found and existing under and in pursuance of the laws of the State of Michigan, and that it has its principal office in the said city of Muskegon.

And plaintiff further avers that thereupon he, confiding in the said undertaking of the defendant, then and there assented to the said
13 assignment of the said contract, and then and there gave permission (in a writing attached to the said contract) to the said defendant to enter upon the lands described in said contract, and to cut and remove from said lands the timber upon them; and that although the day of payment of the sum of three thousand and sixty-eight & $\frac{84}{100}$ dollars, and interest thereon, at the rate of ten per cent. per annum from and after the 23d day of September, A. D. 1874, as specified in said contract, has heretofore elapsed, to wit, on the first day of January, A. D. 1875, the said Big Rapids Improvement and Manufacturing Company did not nor would on that day, or at any other time, pay to the plaintiff the said sum of money last above named, and the interest thereon, as aforesaid, or any part thereof, but refused so to do, whereof the defendant on the day last aforesaid then had notice. Yet the said defendant has not paid to the plaintiff the said sum of money which became due on said contract on the first day of January, A. D. 1875, or any part thereof, but refuses so to do.

And for that whereas, heretofore, to wit, on the 23d day of Sep-
14 tember, A. D. 1874, the said plaintiff entered into a certain other written contract and agreement with an incorporated company, incorporated under the laws of the State of Michigan, and named the Big Rapids Improvement and Manufacturing Company, in and by which the said Big Rapids Improvement and Manufacturing Company promised and agreed to pay to the said plaintiff the sum of twelve thousand two hundred and seventy-three & $\frac{84}{100}$ dollars, as follows: three thousand and sixty-eight & $\frac{46}{100}$ dollars on the first day of January next, after the said twenty-third day of September, A. D. 1874, and interest thereon at ten per cent., and the balance in three equal annual pay-

ments, the first annual payment to be made on the 23d day of September, A. D. 1875, with interest, from the said 23d day of September, A. D. 1874, to be paid on the 23d day of September in each year, on the whole sum remaining due or unpaid in each year, at the rate of seven per centum; and in consideration of said agreements and other promises of the said Big Rapids Improvement and Manufacturing Company the said plaintiff in said contract and agreement agreed to sell
15 to the said Big Rapids Improvement and Manufacturing Company all those certain pieces or parcels of land situate, lying and being in the county of Missaukee, in the State of Michigan, which are known and described as follows, to wit: The northeast quarter and the north half of the northwest quarter of section eighteen; also the southeast quarter and the northeast quarter of the southwest quarter of section eight (8); also the west half of the southwest quarter, the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section twenty-four (24), and all in township twenty-one (21) north of range seven (7) west, containing six hundred and eighty-one & $\frac{88}{100}$ acres of land according to United States survey, be the same more or less, and upon the payment of the sum of money above specified at the time and in the manner above set forth, and the performance of the other covenants of the said Big Rapids Improvement and Manufacturing Company set forth in said contract, to execute or cause to be executed to the said Big Rapids Improvement and Manufacturing Company
16 a good and sufficient warranty deed of the lands above described, so as to convey the same in fee simple free from encumbrances to said Big Rapids Improvement and Manufacturing Company, subject, however, to all taxes, assessments, and liens or titles thereunder which should accrue or be levied after the said 23d day of September, A. D. 1874, and subject to all liens and transfers made by the said Big Rapids Improvement and Manufacturing Company, its successors or assigns. And it was further agreed in said contract that no timber should be cut or removed from said lands without the written permission of the said plaintiff endorsed on the said contract.

And plaintiff avers that afterwards, to wit, on the 25th day of September, A. D. 1874, to wit, at the city of Muskegon, in said western district of Michigan, the said Big Rapids Improvement and Manufacturing Company, for and in consideration of the sum of one dollar, and other valuable considerations, assigned, by an instrument in writing of that date, the contract above mentioned to the said Mason Lum-
17 ber Company, the defendant herein, and in consideration of the said assignment and of the said plaintiffs assenting to the same and giving to the said Mason Lumber Company permission to enter upon, cut and remove the timber upon the lands described in said contract, the said defendant, by an agreement in writing bearing date the day and year last aforesaid, there agreed to pay the plaintiff, and promised to pay him the sum of money specified in the contract above mentioned according to the tenor and effect of the said contract.

And plaintiff avers that thereupon he, confiding in the said undertaking of the defendant, then and there assented to the said assignment of the said contract, and gave permission to the said defendant in a writing attached to said contract to enter upon the lands described in said contract, and to cut and remove from said lands the timber upon them, and that although the day of payment of the sum of three thousand sixty-eight & $\frac{84}{100}$ dollars and interest thereon, at the rate of ten per cent. per annum from and after the 23d day of September, A.

D. 1874, as specified in said contract, has heretofore elapsed, to
18 wit, on the first day of January, A. D. 1875, the said defendant has not paid to the plaintiff the said sum of money last above specified, but so to do has wholly neglected and refused, and still neglects and refuses so to do.

And whereas also the defendant on, to wit, the first day of January, A. D. 1875, to wit, in the western district of Michigan aforesaid, was indebted to the plaintiff in the sum of five thousand dollars for money before that time lent by the plaintiff to the defendant at its request, and in a like sum for money before that time paid and expended by the plaintiff for the defendant at its request, and in a like sum for money before that time received by the defendant for the use of the plaintiff, and in a like sum for interest on divers sums of money before that time forborne by the plaintiff to the defendant at its request for divers spaces of time before then elapsed, and in a like sum for goods, chattels, and effects before that time sold and delivered by the plaintiff to the defendant at its request, and in a like sum for goods, chattels, and effects before that time bargained and sold by the plaintiff to the defend-
19 ant at its request, and in a like sum for money found to be due from the defendant to the plaintiff on an account then and there stated between them, and being so indebted the defendant in consideration thereof then and there promised the plaintiff to pay him on request the several sums of money so due to him as aforesaid, yet the defendant, though requested, has not paid the same, or either of them, or any part thereof to the plaintiff, but refuses so to do; nor has the defendant, though often requested, paid to the plaintiff the said several sums of money in the several counts of this declaration specified, or any of them, or any part thereof, but so to do has wholly neglected and refused, and still neglects and refuses so to do, to the damage of the plaintiff five thousand dollars, and therefore he brings suit, &c.

TAGGART, SIMONDS, & FLETCHER,
Attorneys for Plaintiff.

20 To the above-named defendant:

Take notice that the following is a bill of particulars of all of the plaintiff's demand under the common counts of the above declaration:

June, 1875.—To installment of three thousand and sixty-eight & $\frac{84}{100}$ dollars which became due on this day on a contract dated September 23d, A. D. 1874, made between Wm. Buchtel and the Big Rapids Improvement & Manufacturing Company, afterwards assigned by the Big Rapids Improvement and Manufacturing Company to the defendant, and interest on the same from the 23d day of Sept., 1874, at the rate of ten per cent.

TAGGART, SIMONDS, & FLETCHER,
Plaintiff's Attorneys.

21 To the above-named defendants:

Please to take notice, that on filing a declaration of which the above is a true copy, in the office of the clerk of this court, a rule was duly entered requiring you to plead to the said declaration within twenty days after service of a copy thereof and notice of said rule or judgment, &c.

TAGGART, SIMONDS, & FLETCHER,
Attorneys for Plaintiff.

STATE OF MICHIGAN,
County of Kent, ss:

Charles A. Renwick, of said county, being duly sworn, deposes and says that on the 12th day of April, A. D. 1875, he served this declaration on the within-named defendant by delivering a copy of this declaration to Thomas Munroe, esq., secretary of the said defendant in the county of Muskegon, in the western district of Michigan, together with the notice to appear and plead endorsed thereon as hereon endorsed.

CHARLES A. RENWICK.

Subscribed and sworn to before me this 17th day of April, A. D. 1875.

T. A. WORKMAN,
Notary Public, Kent Co., Mich.

(Indorsed:) The circuit court of the United States for the western district of Michigan and sixth circuit. William Buchtel vs. The Mason Lumber Company. Narr. Rec'd & filed this 12th day April, A. D. 1875. Isaac H. Parrish, clerk. Taggart, Simonds, & Fletcher, Grand Rapids, Mich., plaintiff's attorneys.

22 October term, A. D. 1874.

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY.

MONDAY, *April 12th.*

In this cause, on filing declaration as commencement of suit, and on motion of Taggart, Simonds, & Fletcher, attorneys for plaintiff, ordered that the defendant plead thereto within twenty days after service on it of a copy thereof, together with a notice of this rule or judgment, &c.

TAGGART, SIMONDS, & FLETCHER,
Plaintiff's Attorney.

23 UNITED STATES OF AMERICA:

The circuit court of the United States for the western district of Michigan.

THE MASON LUMBER COMPANY, DEF'T,
ads.
WILLIAM BUCKTEL, PL'FF.

The said defendant, by Smith, Nims & Erwin, its attorneys, now comes and demands a trial of the matters set forth in plaintiff's declaration.

SMITH, NIMS & ERWIN,
Attorneys for Defendant.

Please to take notice that the defendant will give in evidence on the trial of this cause, and insist and prove in its defence under the general issue above pleaded, that at the time and place of making the said undertakings and promises by the said defendant as contained and set forth in said plaintiff's declaration, the said plaintiff as an inducement thereof did then and there represent, undertake, and promise that the said lands mentioned and described in said plaintiff's declaration, then

contained and would yield five million seven hundred thousand
24 feet, board measure, of good merchantable pine timber; that by reason of said representation, undertaking, and promise by the said plaintiff so made as aforesaid the said defendant, confiding therein, was induced to and did take and receive from the Big Rapids Improvement and Manufacturing Company, named in said plaintiff's declaration, an assignment of all its interest in and to the contract named in said declaration by and between the said plaintiff and the said Big Rapids Improvement and Manufacturing Company, which said representation, undertaking, and promise, so made by the said plaintiff as aforesaid, were false and fraudulent in this, to wit, that the said lands at the time of making the said representation, undertaking, and promise, did not contain and would not yield five million seven hundred thousand feet, board measure, of good merchantable pine timber, but contained and would yield only one million five hundred thousand feet, board measure, of such pine timber. By reason whereof the said defendant hath sustained great damages, to wit, twenty thousand dollars, which said damages the said defendant will recoup against any claim that may be proved against it by the said plaintiff in said trial, and will apply the same or so
25 much thereof as may be necessary to the satisfaction of such claim, as the plaintiff may prove, and will have the balance certified in its favor.

Yours, &c.,

SMITH, NIMS & ERWIN,
Attorneys for Defendant.

To Messrs. TAGGART, SIMONDS & FLETCHER,
Attorneys for Plaintiff.

(Indorsed:) U. S. of America. Circuit court for west'n dist. of Michigan. Mason Lumber Co'y, def't, ads. William Bucktel, plff. Amended plea.

Filed Oct. 18th, 1875.

ISAAC H. PARRISH, *Clerk.*

We consent to the filing of this amended plea.
Oct. 18th, 1875.

TAGGART, SIMONDS & FLETCHER,
Plff's Att'ys.
SMITH, NIMS & ERWIN, *Att'ys for Def't.*

MUSKEGON, MICH.

26 UNITED STATES OF AMERICA:

In the circuit court for the sixth circuit and western district of Michigan.

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY.

It is hereby stipulated by the parties to the above cause by and through their respective attorneys that the above cause may be by an order of said court referred to James W. Ransom, esquire, an attorney of this court, as referee, for trial before him as such referee; and that upon the coming in of the report of said referee, this court may pro-

nounce judgment thereupon, or take such action thereon as shall be agreeable to the rights of the parties and the practice of the circuit courts for the State of Michigan in referred causes.

Dated Nov. 8th, 1875.

TAGGART, SIMONDS & FLETCHER.
Pl'ff's Att'ys.

SMITH, NIMS & ERWIN,
Attorneys for Def't.

(Indorsed:) U. S. circuit court, west. dist. of Mich. William Buchtel vs. Mason Lumber Co. Stipulation. Received & filed Nov. 9th, 1875. Chester B. Hinsdill, clerk.

27 UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY. } Assumpsit. Nov. 9th, A. D. 1875.

In this cause, by and in pursuance of the consent of the attorneys of the respective parties by stipulation now on file herein, it is ordered by the court now here that said cause be and the same is hereby referred to James W. Ransom, esq., pursuant to the statute of the State of Michigan in such case made and provided, to try the same, and due report make to this court in accordance with the rules and practice of courts of records of the State of Michigan applicable to referred causes.

28 UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

WILLIAM BUCKTEL, PL'FF,
vs.
THE MASON LUMBER COMPANY, DEF'T.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective attorneys, that Messrs. Eggleston & Kleinhaus be and they hereby are substituted as attorneys for the above-named defendant, in the place and stead of Messrs. Smith, Nims & Erwin, the present attorneys of said defendant.

Dated November 28, 1876.

TAGGART, SIMONDS & FLETCHER,
Pl'ff's Att'ys.

SMITH, NIMS & ERWIN, *Def't's Att'ys.*

29 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 28 day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundred and first (present, the

honorable Solomon L. Withey, district judge), among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTEL
vs.
MASON LUMBER COMPANY.

This cause having been referred, by consent of parties, to James W. Ransom, one of the attorneys of this court, for trial, and said referee having filed his report therein, and said defendant having filed exceptions to said report and to the proceedings before said referee, and said exceptions having been heretofore overruled by this court and the report of said referee duly confirmed, and it appearing to the court now here from said referee's report that said defendant did undertake and promise in manner and form as the said plaintiff hath in his declaration in said cause complained against it, and that he has sustained damages by reason of the premises, over and above his costs and charges by him about his suit in that behalf expended, the sum of three thousand six hundred sixty-seven and $\frac{50}{100}$ dollars, and interest from this date at ten per cent. per annum: Therefore it is considered by the court that the said plaintiff do recover against the said defendant the sum of
30 his damages aforesaid, with interest thereon at ten per cent. per annum from this date, together with his costs and charges to be taxed, and that he have execution thereof. On application it is further ordered that the proceedings in said cause, except the taxations of costs, be, and the same are hereby, stayed for sixty days to enable the defendant to settle a bill of exceptions.

31 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 8 day of December, in the year of Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundred and first (present, the honorable Solomon L. Withey, district judge), among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY.

In this cause, on motion of Eggleston & Kleinhans, attorneys for the defendant, ordered that judgment be arrested, with stay of all proceedings, except as to taxation of costs, until January 3d, A. D. 1877, and that defendant have five days in which to enter a motion for a new trial.

32 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 13 day of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first (present the

honorable Solomon L. Withey, district judge), among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY.

On motion of Eggleston & Kleinhans, attorneys for the defendant, ordered that all proceedings in this cause be stayed until January 28th, 1877, and until the further order of the court.

33 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 3d day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first (present, the honorable Solomon L. Withey, district judge), among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY.

This cause came on to be heard upon a motion for a new trial, and after hearing the arguments of counsel, and due deliberation being had thereon, ordered that the same be, and hereby is, denied, with costs, including an attorney fee of ten dollars.

On motion of Eggleston & Kleinhans, attorneys for the defendant, ordered that the defendant have sixty days in which to prepare and tender a bill of exceptions.

34 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 31 day of March, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first, (present, the honorable Solomon L. Withey, district judge,) among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY.

In this cause, by the consent of the attorneys for the respective parties, ardered that the time given herein in which to settle bill of exceptions be extended thirty days.

35 UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan.

THE MASON LUMBER COMPANY } *ads.* WILLIAM BUCHTELL. } No. 791.

Be it remembered that heretofore, to wit, on the 8th day of November, 1875, the parties to the above-entitled cause, by their respective attorneys, made and entered into a stipulation in writing and filed the same with the clerk of this court that said cause might, by an order of the court, be referred to James W. Ransom, esq., an attorney of this court, as referee, for trial before him as such referee, and that upon the coming in of the report of said referee this court might pronounce judgment thereupon or take such action thereon as should be agreeable to the rights of the parties and the practice of the circuit courts for the State of Michigan in referred causes, and which said stipulation is in the words and figures following, to wit:

36 UNITED STATES OF AMERICA:

In the circuit court for the sixth circuit and western district of Michigan.

WILLIAM BUCHTELL } *vs.* THE MASON LUMBER COMPANY. }

It is hereby stipulated by the parties to the above cause by and through their respective attorneys that the above cause may be by an order of said court referred to James W. Ransom, esquire, an attorney of this court, as referee, for trial before him as such referee; and that upon the coming in of the report of said referee this court may pronounce judgment thereupon or take such action thereon as shall be agreeable to the rights of the parties and the practice of the circuit courts for the State of Michigan in referred cases.

Dated Nov. 8, 1875.

TAGGART, SIMONDS & FLETCHER,
Pl'ff's Att'ys.

SMITH, NIMS & ERWIN,
Attorneys for Def't.

37 That afterwards, to wit, on the 9th day of November, 1875, and upon said stipulation, this court made an order referring the cause to said James W. Ransom accordingly, which order was duly entered of record, and is in the words and figures following, to wit:

WILLIAM BUCHTELL } *vs.* THE MASON LUMBER COMPANY. } Assumpsit. Nov. 9, A. D. 1875.

In this cause, by and in pursuance of the consent of the attorneys of the respective parties by stipulation now on file herein, it is ordered by the court now here that said cause be, and the same is hereby, referred to James W. Ransom, esq., pursuant to the statute of the State of Mich-

igan in such case made and provided, to try the same, and due report make to this court in accordance with the rules and practice of courts of record of the State of Michigan applicable to referred causes.

38 That afterwards, to wit, on the 7th day of December, 1875, the parties appeared before said referee and proceeded to the trial of said cause, and severally produced their witnesses before said referee, who were duly sworn and examined in behalf of the respective parties.

That upon and during the trial of said cause before said referee, the said defendant took numerous exceptions to his rulings, which are fully set forth in a bill of exceptions duly allowed, settled, and signed by said referee, and by him reported to this court and duly filed with the clerk thereof on, to wit, the 19th day of July, 1876, pursuant to the statute of the State of Michigan, which bill of exceptions is hereby incorporated into and made part of this bill of exceptions, and is in the words and figures following, to wit:

39 STATE OF MICHIGAN:

The circuit court of the United States for the sixth circuit and western district of Michigan.

THE MASON LUMBER COMPANY, DEFENDANT,
ads.
WILLIAM BUCHTELL, PLAINTIFF.

Before the Hon. J. W. Ransom, referee in said cause.

At a session of the said referee court, held at his chambers, in the city of Grand Rapids, in said circuit and district, on the seventh day of December, A. D. 1875, before the Hon. J. W. Ransom, the said referee in said cause, the issue joined between the parties in this cause came on to be heard by the said referee, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys.

And upon the trial of the issue aforesaid, the counsel for the said plaintiff, to maintain and prove the said issue on his part, pro-

40 duced and offered in evidence certain contracts for the sale of lands, bearing date the 23d day of September, A. D. 1874, between William Buchtell, the plaintiff in this cause, of the first part, and the Big Rapids Improvement and Manufacturing Company, of the second part, which was in the words and figures following (see contract, Exhibit A, annexed), and to which said last-named contract or writing obligatory was annexed another paper writing obligatory, in the words and figures following, to wit (see Exhibit B annexed). But to the reading of the said papers in evidence the said counsel for the said defendant did then and there object, because the said first-named contract (A) was not a writing obligatory between the plaintiff and the defendant in this cause and did not of itself import any liability against this defendant, and that it was immaterial.

And to the second paper (B), because it is immaterial and irrelevant, and is not the paper writing described and set forth in the plaintiff's declaration in this cause.

But the said referee did then and there declare and deliver his opinion that the said objection so taken by the counsel for the said defendant as aforesaid ought not to be allowed, but that the said writings

41 obligatory ought to be admitted in evidence, and did accordingly decide that the same should be read in evidence on the part of the said plaintiff, to which said opinion and decision of the said referee

the said counsel for the defendant did then and there, on behalf of the said defendant, except.

It was then admitted that the Big Rapids Imp. and Man'f'g Company and the Mason Lumber Company were corporations existing under the laws of the State of Michigan.

The said two writings obligatory were received and marked A & B.

And the said counsel for the said plaintiff, further to maintain and prove issue on his part, called William Buchtel, who, being duly sworn, testified; I am the plaintiff; am a citizen of Ohio; reside at Akron, in said State; am the William Buchtel named in the contracts A & B just received in evidence; have been in the lumber business for the last 9 or 10 years.

The counsel for the said plaintiff asked the said witness:

Q. State as to what payments, if any, you have received upon those contracts.

(To which question the counsel for the defendant duly objected
42 as being immaterial and incompetent. But the said referee overruled the said objection and permitted the said question to be answered; to which ruling of the said referee the counsel for the defendant then and there duly excepted.)

The witness answered, "I have not received anything on either of them."

The said plaintiff then rested his case.

The counsel for the said defendant, to maintain and prove the said issue on his part, produced and had sworn as a witness Lyman G. Mason, who testified substantially:

I reside at Muskegon, Michigan, in said district; am the president of the defendant; my business is lumbering; have been at that business since 1856. I have known the plaintiff since Sept., 1874. I know the Big Rapids Improvement and Manufacturing Company; know Stephen Bronson; have known him for a number of years. I saw the papers, Exhibit A and B, on the 25th of Sept., 1874, for the first time.

Question by defendant's counsel:

43 2. State, if you know, how the Mason Lumber Company came to execute Exhibit B; that is, the circumstance that induced it.

A. Well, it was executed because of representations that were made as to the quantity of timber upon the lands described in the contract attached to it, Exhibit A.

The witness further testified: The representations were made by the plaintiff Buchtel and Mr. Bronson, and by a plat of the township exhibited, the lands colored, and figures showing the quantity in each section. (The witness here identified the plat exhibited at the time last named.) I cannot say who brought the plat to my office; it was there when we were all together at the time this writing was made, Exhibit B. I suppose Bronson and Buchtel came together; they were there together on the 25th of Sept., 1874. I think Gen'l Bronson took the plat away. I afterwards got it from him.

The figures that are now on the map, i. e., 1,700 on sec. 18, 1,800 on sec. 8, i. e., just below the colored line on sec. 8; it is on sec. 17, and 1,000 and 1,200 on sec. 24, were on the map as now on the 25th of Sept., 1874. William Buchtel came to our office with Mr. Bronson, presented the contract which has been marked Exhibit A, and we had a
44 contract previously with the Big Rapids Imp. and Man'f'g Co. for a quantity of said logs to be cut from lands the same as described in this contract Exhibit A, and including some other lands. Of course

Mr. Buchtel objected to the cutting; in fact Mr. Bronson had no right to cut; at the same time, when they came together upon these lands, as they had not been paid for; and after considerable talk between us three, and part of the time with Mr. Monroe, our secretary, who executed this agreement, and upon the representations as to the quantity of timber that we were to get under this contract of Bronson and could get from this land, we signed this instrument, Exhibit B.

The plat was exhibited, the quantity of timber represented; and because of those representations Exhibit B was executed.

Question by defendant's counsel:

Q. What were the representations?

(To which question the attorney for the plaintiff did then and there object, because the question does not limit the answer to representations made by the plaintiff Buchtel.

And thereupon the said referee declared and delivered his opinion that the said question "might be answered under the instructions
45 which are now given, and which I have intimated before, that whatever Mr. Bronson may have said is not material to the case, and the plaintiff is not bound by it until they show either Mr. Bronson acting as the agent of the plaintiff, or the plaintiff present and assenting to what Mr. Bronson said in relation to the quantity of timber. I think the question may be asked."

To which ruling and instructions so given by the said referee the attorney for the said defendant did then and there duly except.)

Witness then answered: "The representations were that the quantity of timber designated by these figures was on the lands."

The referee then instructed the witness: "Give what was said, as near as you can: the conversation in relation to it, as near as you can;" when the witness proceeded: "Well, the interview lasted, I should presume, several hours; my recollection of it and just what was said: I recollect one remark that was made after we had come to an understanding. I remarked to Mr. Buchtel and to Mr. Bronson—we were both present, and I think Mr. Monroe was present at that time—that the Big Rapids Imp. Co. had a good thing in this contract; they had a clear margin of quite an amount of money, and made some rough figures as to the
46 amount that it would net them, or the cost, I will not say which, they paying so much for putting the logs in, and we paying the contract price between them and us, and for the logs. The quantity of timber, as I said before, I think was 5,700,000 on these sections—8, 18, and 24. I took the figures down at the time and made a duplicate plat of it.

Question by defendant's attorney:

Q. State this remark that you have just now stated as having been made by you, whether it was based upon that representation or not.

(To which question the att'y for the said plaintiff then and there objected, as irrelevant, immaterial, incompetent, and leading.)

Which objection so taken by the attorney for said plaintiff was sustained by said referee, and the answer to said question was not permitted to be given.

To which ruling of the said referee the attorney for said defendant did duly except.)

Question by defendant's attorney:

Q. I ask him why he made that remark?

(To which question the attorney for the said plaintiff then and

47 there objected as incompetent. What his reasons were—the reasons must be gathered from the substance of the conversation.

Which objection so taken by the attorney for said plaintiff was sustained by the referee, and an answer to said question not permitted.

To which ruling of said referee the attorney for said defendant did duly except.)

Question by defendant's attorney:

Q. What led you to make that remark?

(To which question the attorney for the said plaintiff then and there objected as incompetent.

Which objection so taken by the said plaintiff was sustained by the referee.

To which ruling of said referee the attorney for said defendant duly excepted.)

Question by defendant's attorney:

Q. What conversation led you to make that remark?

(To which question the attorney for the said plaintiff did then and there object as incompetent and immaterial.)

Question by referee to defendant's counsel:

Q. Is that material?

Counsel for defendant answered: "It is explanatory. I say
48 that the remark as it now appears is misleading; it gives it as the judgment of Mr. Mason, a lumberman, that the Big Rapids Improvement Co., under that original contract marked A, had a good contract. Now I propose to show how he came to make that remark, and whether as matter of fact it was correct or not.

To which answer and offer of defendant's counsel said referee then and there delivered his opinion as follows:

"The remark was made," he says, "after they had come to an understanding and after their business was, as matter of fact, settled. It was not responsive to any question that had been put to him. It don't seem to me that there is any significance at all to the remark.

And said referee refused to permit the question to be answered.

To which opinion and ruling his, defendant's, counsel then and there duly excepted.

The witness further testified that the portion of sections 8–18 and 24, in town. 21 north, range 7 west, and set forth in the contract Exhibit A, were the lands represented to contain 5,700,000 feet of pine timber.

49 Mr. SMITH. Who made those representations as to the amount of timber on the lands?

A. I think they both did; certainly Mr. Buchtel did not object, did not contradict them, and the map was presented and my whole action based upon the information that I got then and there from those two men as to the quantity of timber on the lands. Mr. Ballard moved to strike out the latter part of the answer as not responsive to the question.

The witness immediately further answered: "From the men and the plat."

The REFEREE. As the witness now has it, it may stand. That such representations were made by the plaintiff, Buchtel, and Stephen Bronson, and the plat introduced and marked Exhibit C. That the plat C was produced in connection with Exhibit A, which was in duplicate;

that during this interview, at the time the representations aforesaid were made, Buchtel, the plaintiff, Stephen Bronson, Thomas Monroe, and the witness was present. That he received no other consideration or inducement from Mr. Buchtel than the representations made as to the quantity of pine on section 8–18 and 24, above named, nor from
50 any person for him for the signing of Exhibit B. Further, that he had no knowledge whatever at the time of the execution of Exhibit B of the quantity of timber on described parts of sections 8–18 and 24, excepting what he had derived from the plaintiff, Buchtel, and Bronson together, at that time. That the Mason Lumber Company had no knowledge as to the quantity of timber on the land last above described on said 25th of Sept., 1874, so far as witness knew. That said company derived its knowledge as to the quantity of timber on said lands on said 25th Sept. from said Buchtel and Bronson.

Mr. SMITH. For whom was Mr. Bronson acting then, if you know, on the 25th day of September, 1874?

A. For the Big Rapids Improvement and Manufacturing Co.

That witness on said 25th of Sept. was the president of the Mason Lumber Company and carried on the negotiations on said day in behalf of said company.

The witness further testified that there was cut from the lands named in Exhibit A, since said 25th of Sept., of all qualities, to the amount of 1,162,343 feet.

Question by defendant's counsel:

51 Q. State, Mr. Mason, whether, after the signing of Exhibit B, you paid any money to Mr. Buchtel or Mr. Bronson, and what amount?

(To which question counsel for the plaintiff objected as immaterial as to payments to Mr. Bronson.)

The counsel for the defendant stated: "The materiality is this: We claim that under the contract of Sept. 17th, Exhibit , Mr. Bronson represents that his company is the owner of the lands which are described in Exhibit A, and had the right to cut the timber therefrom and deliver it to the Mason Lumber Company, and under and by virtue of those representations made Sept. 25th, 1874, that there was 5,700,000 feet of timber on these lands. Exhibit B was signed by Mason Lumber Company, and $1,500 or an amount of money was paid over. It was a part of the transaction and following those representations, and we say there was a privity of interest between Buchtel and Bronson, and a privity of representation between those two men for the purpose of getting money out of the Mason Lumber Company.

By the REFEREE: I cannot see any relevancy to the testimony showing payments of money to Mr. Bronson, so far and pursuant of a
52 common design between Mr. Bronson and Mr. Buchtel, which would indicate in any manner that they were pursuing a fraudulent transaction. There is nothing of that kind appearing in the case yet. So far as Mr. Bronson is concerned, I think I must sustain the objection, at this stage of the case at least.

The objection sustained and exception taken for defendant.

The witness answered: "I paid none to Buchtel."

Q. What was done by defendant in consequence of the representations made as to the quantity of timber on the lands named in Exhibit A, and after the execution of Exhibit B?

(Plaintiff's counsel objected. It is certainly the same question that was asked before in relation to the payments.)

Defendant's counsel stated: "We expect to prove by this evidence, and the object of this interrogatory is to show, that relying upon those representations as true, the defendant paid over money to the Big Rapids Imp. and M'f'g Co. under their contract, which they would not have done except for the representations held out by Buchtel and Bronson as to the quantity of timber contained on these lands, and we expect to ask judgment by way of recoupment.

53 Without the explanation I should have permitted the question to be asked, but under the explanation I can't see how it is pertinent or proper that the pl'ff should be held responsible for the payments made to Bronson, unless the plaintiff was a party to the arrangement by which the payments were made. It does not seem to me that it is within the scope of the issue.

(Plaintiff's counsel further objected as immaterial and incompetent.)

Objection sustained by the referee and exception taken for the defendant.

Q. Was Mr. Buchtel aware of the existence of the contract that we introduced this morning, marked Exhibit D, on said 25th of Sept., 1874?

A. I think he was fully aware of it. We had entered into a contract. Mr. Buchtel, the Big Rapids Imp. and M'f'g Co., and the Mason Lumber Company, which refers to that contract and which is signed by Buchtel.

Q. You think he was?

A. Yes, sir.

Q. Now I shall press the question which I asked before. What was done by defendant in consequence of the representations made as to the quantity of timber on the lands named in Exhibit A, after the execution of Exhibit B?

(Objected to by plaintiff's counsel the same as before.

54 Defendant's counsel states: "We propose it now under a different statement, and that is to show what was done in consequence of those representations or acts of the parties.")

The REFEREE. The witness may answer the question, and will answer under the ruling which I have already given in relation to payments to Bronson, or anything of that kind. The transaction, of course, must be confined between himself and the plaintiff.

(An exception taken to the referee's ruling by defendant.)

Witness answers: We proceeded with the contract we had for the timber supposed to be on the land, and made the payments according to that contract until we became satisfied, or felt or became informed, that the timber was not going to hold out, and my impression is until January, or thereabouts.

Q. That the timber was not going to hold out on what land?

A. On these lands.

Q. Exhibit A lands?

A. Yes, sir; the other lands we were not to have the timber from until after a certain quantity was delivered to other parties.

Mr. BALLARD. Wait a moment. I ask to have that answer

55 entirely stricken out as entirely incompetent and irrelevant, and, further, for the reason that he does not pretend to separate the lands here in Contract D from those mentioned in Contracts A & B. I insist upon my objection mentioned being stricken out.

REFEREE. I think I will let the testimony stand just as it is; but at the same time I say, as I have already said, that I can't see, under the pleading in this case, how it can be material what money he paid under Exhibit D, unless plaintiff is connected with that transaction in

some way more than in the testimony which is already in shows that he is.

Q. Go on and answer the question fully.

A. I thought I had answered it.

Q. No. Whether you went on and performed, what did you do in that performance, something besides ascertaining the quantity of timber, I suppose?

Mr. BALLARD. This is all considered under the same objection, I suppose?

REFEREE. Yes.

A. We made payments—one payment that day after the execution of this, that was stipulated to be paid.

Q. State the amount.

A. $1,500 that day, and $3,000 I would say, the following
56 month (a contract here handed to the witness to refresh his memory); October 10th, $2,000; November, $3,000; and, if I recollect right, December, $3,000; some other payments to apply on December 10th to the amount I think of about $1,000; I would say January 10th, from my recollection of just the amount that were paid; I am not positive about after December.

Q. Upon the hypothesis that there was 1,162,343 ft. of timber cut from those lands, and that there is about 75,000 yet remaining upon those lands only, state what damage the Mason Lumber Company suffered by reason of this shortage between that amount and the amount represented by the plaintiff in this suit.

A. The No. 1 logs amounted to 815,000 ft., and the No. 2 to 346,000 ft. The same ratio would give in the neighborhood of 4,000,000 ft. of No. 1 logs out of 5,700,000 off of that land, and 1,700,000 of No. 2; that would leave us something over 3,000,000 ft. of No. 1 logs short.

Q. State how much; just give the exact figures.

A. If it was just 4,000,000 that it should yield of No. 1, it would give us 3,000,185 that we were short, receiving only 815,000—in round numbers 3,000,000; and of the No. 2 there should be a shortage of
57 1,350,000. The No. 1 logs afforded us a profit of at the least calculation $2.00 a thousand; the No. 2 logs, I don't suppose, would furnish us any profit; those we purchased afterwards, and were not taken into consideration at the time of the negotiations.

Q. State whether you could procure the same class of timber at that point or at any point along the Muskegon River, after this default, this shortage became known or not.

(Objected to for plaintiff as incompetent. Answer taken, subject to the objections sustained.)

A. I don't believe it would be possible to have procured that quantity and quality of logs after January at any such price, if at all.

Q. You say after January; was that the time the shortage became known to you?

A. Some time during the month of January I became pretty well satisfied that the timber was not going to hold out.

Q. State whether, in consequence of this default, you were put to any trouble or expense to get other logs to stock your mill; and, if so, to what amount.

(Objected to for plaintiff, and taken as last above.)

A. We were obliged to purchase other logs, but at what extra
58 cost or trouble I could not state in dollars and cents; we did purchase other logs to make up our stock for our mill, which, of course, we should not have purchased had they come down; we pur-

chased common logs as a rule after that, and such as the market afforded, and no very good ones.

Q. Are you able to state now whether those that you did purchase afforded any and what margin as compared with these No. 1 logs?

(Objected to for plaintiff as incompetent. Taken, subject to objection.)

A. I can state, generally, there was no profit on common logs or on common stock; our margin has been entirely on our good stock. I have not the figures.

Cross-examination:

During the cross-examination the witness was shown a paper by plaintiff's counsel, and asked:

Q. Do you know that handwriting and that signature?

A. Yes, sir.

Q. Whose is it?

A. Mine.

59 (Plaintiff's counsel here offers the paper in evidence, stating that it was out of the ordinary order of proof, but he wished it put in because he wished to ask the witness some questions about it as a part of plaintiff's case.

To the reception of the paper in evidence defendant's counsel objected as irrelevant, immaterial, and not cross-examination.

The objection not going to the order of proof, paper taken and marked Exhibit E.)

Q. How long prior to the date of this letter, marked Exhibit E, did you know that Bronson had not paid the first payment on Exhibit A.

A. Well, previous to the 10th. That telegram was on the 10th. Mr. Buchtel was at Muskegon the day before, I think, or the day or two before, and went from Muskegon to Big Rapids.

(Defendant's counsel suggested: "You stated that telegram was the 15th once.")

WITNESS. I got mixed on that date.

Q. The question is, how long before the date of that letter did you know that Bronson had not paid this first payment on Contract A?

A. I can't tell you.

60 Q. Do you know what that letter was in answer to?

A. It does not appear to be in answer to anything, to any letter.

Q. Have you any recollection about it as to whether it was or not?

A. I have not now (refers to paper). No, it does not appear to be in answer to any letter.

Q. State whether or not you had a conversation with Mr. Buchtel himself some time in January in relation to this payment.

A. He was at Muskegon and we talked the matter over, and he went from Muskegon to Big Rapids.

Q. About when was that?

A. It was the day before that telegram was sent from Big Rapids; if that is dated the 15th it must have been the 14th.

Q. And if it was the 10th it must have been the 9th?

A. Yes, sir; I have no other means of stating the time.

Q. Can you give us that conversation that took place between you and he in relation to this payment?

A. No, sir. He went from Muskegon after that conversation with a view——

Q. No; I don't care about that. I simply ask whether you could give that conversation at this time; whether you could state the substance of it?

61 A. No, sir, I cannot; I can only state that I undoubtedly told him the situation.

The referee here calls your attention to the conversation; give it if you can.

A. No, sir; I have no distinct recollection about it.

(Plaintiff's counsel says: This letter, Exhibit E, seems to be a little ambiguous. I wish to ask you what payment you had reference to in the language of that letter?

Objection for defendant that it is immaterial and incompetent.

The objection is not to the order of proof.

Testimony taken.

Defendant excepts.)

A. It refers to the first payment on Contract A.

THOMAS MONROE sworn for the defendant:

I live at Muskegon; am secretary of the defendant. Saw the plaintiff at defendant's office, in Muskegon, on the 25th of Sept., 1874. Gen'l Bronson, Mr. Mason, and myself were with him at the time. He came to the office with Mr. Bronson probably about 9 o'clock a. m. The plaintiff had business transactions there on that occasion with defendant. The plaintiff and Gen'l Bronson came together to defendant's office. Mr. Mason came in about the same time. The matter of sale of logs came up.

62 (The contract of Sept. 17th, Exhibit D, shown the witness.)

This was shown, looked over, and I think read by Mr. Mason; read it aloud in the presence of Mr. Buchtel and Bronson.

(A plat, Exhibit C, shown.)

Mr. Bronson and Mr. Buchtel did most of the talking. Mr. Mason did the figuring; Mason occupied one side of the table, Buchtel and Bronson the other. Mason had a scratch book before him. Buchtel and Bronson did most of the talking, and showed the amount of timber that was on the described parts of sections 17, 18, & 24, in dispute in this case, in town. 21 north, range 7 west. Mason did the figuring; took the amounts off of timber as represented on the plat.

Q. What was the amount of timber, if you recollect, that was represented by the parties as being on those lands on parts of sections 8, 18, & 24, in town. 21, 7?

(Objected to for plaintiff. The question is too general; is not confined to representations made by plaintiff.)

A. Well the amount was as shown by the figures that are there now; 1,700,000 f't on section 18.

1,800,000 " " " 8.

2,200,000 " " " 24.

63 Q. State what part plaintiff took in these conversations and negotiations that you have now related.

A. Well, they both did the talking. Mr. Mason did some talking; asked questions and took figures down as they gave them to him.

(Exhibit C laid on the table, with other papers between them.)

Q. Can you give us the language of what each said? You have been giving the conversation; we want the language of each of the actors as near as you can give it.

A. I cannot give the exact words that each party said that day; the

talk was general; both parties represented that there was a large amount of timber; I mean Mr. Buchtel and Mr. Bronson.

Q. Can you state substantially the conversation as it occurred?

A. Yes; it was substantially this: that there was 5,700,000 f't of timber there on the lands described and of good quality; the quality was the same, about, on all the descriptions.

What lands do you mean?

(Objected for plaintiff as not separating the matter.)

REFEREE. Taken subject to the objection.

A. The lands described and marked on Exhibit C, in sections 8, 18, & 24.

Witness further says: Both Buchtel and Bronson made that
64 representation. The described parts of section 24 were described as being of equal quality to sections 8 and 18, by Mr. Buchtel, because no one else knew about them. Section 24 was substituted at that time in contract Exhibit D in place of section 4. This conference lasted in the office, I should think, a good part of the forenoon, if not all. As the result of these negotiations in the office, Mr. Mason wrote out two agreements on such paper as this legal cap in pencil, one for the lands in 21, 7, and one for some lands in 21, 8; after he had written that out we looked over them together, and they were read to Buchtel and Mr. Bronson and agreed upon. I made two copies of one; the bookkeeper two copies of the other. My recollection is they were made in the forenoon and executed in the afternoon. The result of these negotiations was the execution of Exhibit B.

Q. State, if you know, what was the particular inducement in the signing of Exhibit B, on the part of defendant, or execution of it.

(Objection to the last question for plaintiff; the question calls for an inference, not for a fact.)

REFEREE. Let him state all that took place in those negotia-
65 tions there between the parties as near as he can, if he has not already stated it. I don't think it would be proper to ask the witness that question, "What was the inducement?"

WITNESS. I think I have already answered that.

Mr. SMITH. Then I understand the referee rules the question an improper one?

REFEREE. Yes, sir; that is a conclusion of the witness; result of certain facts of which he is cognizant or supposed to be cognizant. Now you can state those facts.

(Objection sustained; exception taken for defendant.)

A. It was the amount of timber represented to be on the lands. It has been our custom for me to execute contracts.

Q. State, if you know, whether or not Mason Lumber Co. would have executed Exhibit B had not been for the representations of plaintiff, Buchtel, that there was 5,700,000 f't of pine timber on the lands described in town. 21, 7, and sections 8, 18, & 24, as marked on Exhibit C, and being the same lands described in Exhibit A.

(Objected to for plaintiff that the question calls for an opinion of the witness; not only of his opinion of the result of certain facts supposed to be known by him, but, further than that, it calls for his opinion
66 as to the workings of L. G. Mason's mind, and is incompetent, irrelevant, and immaterial.)

By the REFEREE. Objection sustained.

Exception taken for the defendant.

Q. Would you, as one of the members of Mason Lumber Co., and as an officer, have executed the papers writing marked Exhibit B, in be-

half of said company, had it not been for the representations then made by W. Buchtel, the plaintiff, that the lands described in the last preceding question contained the amount of pine timber stated, namely, 5,700,000 f't?

(Objection for plaintiff, the same as the last preceding.)

By REFEREE. Objection sustained, and exception taken for defendant.

Cross-examination:

In answer to question by plaintiff's counsel, witness says: It was about 9 o'clock in the forenoon when plaintiff and Bronson came to defendant's office. I was about the office. The negotiations were carried on in Mr. Mason's room. My business in and about the office is to do anything in the business that presents itself. My principal business that day was the transaction I have been detailing. I stepped out of the
67 room at times. Part of the time I was standing by the side of Mr. Mason, part of the time sitting down on the same side of the table. I was in the room most of the time till the execution of Exhibit B. I did not hear every word of the negotiations; heard the most of them; made it a point to be there most of the time, looking things over. I would not execute a contract without consulting. I don't think Buchtel, plaintiff, left the office until towards noon, when he stepped out back of the office, going down about the barn, say about eleven or half past eleven. It was about as near twelve o'clock as it could be when he returned. He was gone from twenty minutes to one-half an hour; cannot say if any one was in Mason's room at the time Buchtel was gone out; can't say where Bronson was. Mason was with Buchtel part of the time. They came back together. I think the contracts were drawn before Buchtel went away and were being copied while Mr. Buchtel was out. Buchtel was away after that in the afternoon; I think the contracts were signed after he returned from down below, (i. e.), they were signed in the evening before five o'clock; before tea. We had an interval of an hour or an hour and a half at dinner, when none of
68 the parties were at the office. I left for dinner pretty soon after twelve o'clock. My recollection is that Bronson, Buchtel and Mason were together in the office after Mr. Buchtel returned from the mouth. I don't think we had any lights in the office at the time; it was before dark. I think Bronson was not about the office much of the afternoon, but returned before Buchtel did; can't say how long they were there. I think the contracts were all done at the same time; of that I am certain. It was not very long after Buchtel and Bronson came in the morning before I saw Exhibit C on the table. I don't know who produced it. The first I saw of it it lay open on the table with the contract of Sept. 17th, and these two land contracts. Exhibit C was shown there early in the forenoon; can't say who first spoke of the plat nor what was said by such person; that is, the words which the person used. I think Bronson first spoke of their business when they came in in the morning. He said they had come to fix up that land matter. I had no intimation of their coming; don't know that Mason had. Contract Exhibit D is in my handwriting. That is my signature on it.
69 Did not see Exhibit C at the time Exhibit D was made. The first time I ever saw Exhibit C was the morning of the 25th of Sept., 1874. In contract D there were some lands covered by it as part of the lands that the Big Rapids Imp. and M'f'g Co. claim to own with the rest of the land. When Mr. Buchtel came there he said he didn't own that but he did own some on section 24; that was the same quality of timber, and at his request they were substituted in place of the lands

on sec. 4. I do not know that Mason and Buchtel were together in the office alone. Buchtel stepped into the adjoining room, and I stepped out with him; that left Mr. Bronson and Mr. Mason together in the office. I got the pencil draft to copy in the forenoon. I should think at half past eleven. The bookkeeper got the draft of the other contract before dinner; can't say if he finished his copies before dinner. My recollection is that both contracts were executed at the same time, and after Mr. Buchtel's return, towards evening.

Plaintiffs' counsel shows witness paper writing, afterwards marked Exhibit F. Witness says: "This is the paper written by the bookkeeper at the time."

Paper offered in evidence.

70 (Objected to as irrelevant and immaterial by defendant.

Objection overruled. Exception for defendant. Paper received and marked Exhibit F.)

Mason and Buchtel returned from the barn about twelve o'clock. I saw them returning from the barn and salt well. I don't think that Buchtel had been away from the office before he went away that time. I don't recollect Buchtel being absent on two occasions during these negotiations.

Redirect examination:

In answer to defendant's counsel, witness says: Defendant had no knowledge as to the quantity of timber on these lands described in Exhibit A prior to these negotiations on Sept. 25th, 1874. I think the copies of contracts were commenced before dinner, but were not finished until after dinner. My recollection is that the bookkeeper was making his copies at the same time I was at mine. Am not sure if we commenced together, but they were both executed when Buchtel returned from down below.

61 Recross:

In answer to plaintiff's counsel, we had some knowledge of the quality of timber on sections 8 & 18, but no knowledge as to the quality or quantity of the timber on section 24, either on Sept. 17th, or at any time prior to the 25th, as I have stated, and no knowledge as to quantity on sections 8 & 18.

LYMAN G. MASON recalled for defendant.

Q. State whether you would have made this contract, Exhibit B, for the Mason Lumber Co. had it not been for the representations made by Mr. Buchtel as to the quantity of pine timber on sections 8, 18 & 24, being 5,700,000.

(Objected for plaintiff: 1st. The question assumes that which is not proven, to wit, that Buchtel made such a representation. 2nd. That it is incompetent as calling for an opinion and not a fact. Objection sustained, and defendant excepted.)

Q. What was the inducement which caused the Mason Lumber Co. to execute Exhibit B?

(The same objection as to the last preceding question for plaintiff. The objection sustained, and exception for defendant.)

72 Q. Look upon Exhibit F, the plaintiff's exhibit, and state when that paper was executed and how it came to be executed.

A. It was executed at the same time Exhibit B was, and executed because Mr. Buchtel claimed the timber on that land, or objected to its being cut beyond what was required to fill a contract Big Rapids Imp.

and Co. had with Eldred & Co., and this agreement is for the payment of stumpage on any that might be cut from that land and delivered on contract D to us, a separate contract entirely from the one in connection with this is Exhibit A. Buchtel informed me on this 25th day of Sept. that he had a mortgage on those lands; that was the first I knew he had a mortgage on it. As to the title to the lands named in Exhibit F, I have no knowledge from Buchtel as to it prior to that date. Bronson claimed to hold the land by deed from Buchtel. I mean the lands in contract F, and for part of the lands named in contract D. Bronson told me that his company had deeded these lands or mortgaged them to secure it' contract for 2,500,000 f't.

Q. Now state whether one object of Buchtel's coming there was
73 to close this contract, Exhibit B, and also get security for the payment of moneys due him on the mortgage from Bronson; what did Buchtel say about it?

A. I cannot state any particular words. The result of what was said was the execution of this contract to secure Mr. Buchtel $2.00 per M on logs that we should cut under our contract from that land to be applied as stated in the contract.

Q. Did Mr. Buchtel appear anxious on that occasion to have the arrangement perfected which culminated in the execution of Exhibits B & F?

(Objected to by plaintiff as immaterial and incompetent.)

REFEREE. I don't think the question is proper. He can state the transaction. He can give a description of the appearance of the party and his actions and everything that would tend to show interest or lead one to the conclusion that he was laboring under undue excitement.

Referee sustained the objection, and exception was taken for defendant.

STEPHEN BRONSON, sworn for defendant and testified in answer to question by def't's counsel:

I reside at Big Rapids, have for 9 or 10 years; am vice-president
74 of the Big Rapids Imp. & Man'f'g Co. I know pl'ff; have known him four years. Had business with him for our co. some time in Sept., '74. I, as an officer of the Big Rapids Imp. & Man'f'g Co., had business with pl'ff about the 23d Sept.

Witness looks at Exhibits A & B & says: Exhibit A was executed at Big Rapids on the 23d Sept., '74, and Exhibit B at Muskegon on the 25th same month, in the office of the Mason Lumber Co. At the execution of B were present, the pl'ff, L. G. Mason, Thomas Monroe and witness. The execution of Exhibit B was the result of a negotiation with Mr. Mason on behalf of def't in Mason's office. Mr. Buchtel, the pl'ff, and myself came there to Mason's office with a view of consummating something of this character or kind, and called upon Mason and exhibited to him the situation of things, having formerly made a contract with def't to sell it 4,000,000 feet of pine saw-logs, and in order to carry out the arrangement between the Big R. Imp. & Man'f'g Co. and def't satisfactorily as a result this contract (Exhibit A) was drawn up and guaranteed by the def't.

75 Q. Was there anything said by the parties present, and by whom, if anything, with respect to the amount of timber upon the lands in that Exhibit A on that day and in that negotiation?

(Objected to for pl'ff as incompetent and not confining the conversation to Mr. Mason & pl'ff; any conversation between Mason and Bron-

son is incompetent. It has the same status that that had the other day.)

The REFEREE. Yes, sir; take it as that was. Exception taken for def't.

A. I am unable to state by whom the conversation or negotiations were introduced, but during the conversation that we had, this map C was laid before the parties, Mason, Buchtel, Monroe and myself, and a computation was made from this paper C with regard to the quantity of timber claimed to be on the lands described in Exhibit A, and Mason said, in view of all the circumstances, he would enter into an arrangement of that kind, to guarantee the contract; that was the result of it, that he thought that it was safe under the showing. On section 24, one
80 was marked on Exhibit C, 1,000,000; the other two 80s 1,200,-
76 000. Sec. 8 was marked 1,800,000, and sec. 18, 1,700,000. The figures on sec. 24 stand plain as they did then; they were on this plat when it came into my possession and were on it at the time we were making those figures. Those on sec. 8 are the same as then, those on sec. 18 are the same as then, and the writing the same, "cork and sap pine," on each piece. Buchtel assisted in making figures; figured up and exhibited to Mr. Mason with myself together the quantity of pine as shown by that map, and we talked from that basis. The am't of the figures was 5,700,000 feet. As the result of these negotiations, Mason executed Exhibit B.

Cross-examination:

In answer to question by plff's counsel, witness says: I think plat C came into my possession in August, '74; I got it from Aaron Miller. I think I carried it to Muskegon on the 25th of Sept., '74. Can't say who called for it, Mason or Buchtel, or whether I produced it without a call.
I took it away when we were through, and think I kept it till Feb.
77 or March, '75. I then gave it to Mason (the pres't of def't). I think it was about 9 a. m. of the 25th of Sept., '74. Buchtel and I went to Mason's office—may have been later than 10 a. m. I think we were all there together until the business was transacted; one or the other may have passed out for a few minutes during that time. I should say that it was in the afternoon when we got through, and Exhibit B was signed and the business fully completed, and the papers exchanged. Buchtel and I went to Muskegon pursuant to an agreement we made at Big Rapids. These papers were executed from appearance and dates at Big Rapids. Buchtel and I had our business done and contracts drawn at Saginaw, but come to Big Rapids that the officers of our co. could execute them. The contract is in the handwriting of a Saginaw lawyer; he drew it. I don't know if Elisha Eldred was at Saginaw when this contract was drawn or not. These negotiations took place in Mason's private room on Sept., 25th. I think Monroe was present during all the time the negotiations were going on; but I think he assisted in writing the papers and was
then in the other room; might have passed in and out during
78 that time. I don't recollect that Buchtel was out during these negotiations any considerable length of time till the matter was closed up. He went away during the afternoon. Next after the closing up of those transactions, I saw Buchtel at the Occidental Hotel in the evening.

Redirect examination:

In answer to questions by def't's att'ys, witness said: Buchtel told me to get the plat Exhibit C from Miller. I don't know if Miller was acting in any capacity for Buchtel or not.

In answer to referee, witness says: Think A was executed in duplicate and signed by each.

In answer to def'ts counsel, witness says: The contract A was signed at Big Rapids, but it was not considered complete and finished till we got through with Mr. Mason. That was the way that I understood it. It was not to be considered complete till he had Mason execute B. I cannot say who had the contracts till we got to Muskegon. Don't think they were exchanged till we got there. I cannot say if I had them
79 both or if Buchtel had, or whether each had one; but the business was not considered complete till we finished up with Mason or in some form satisfactory to Buchtel.

Recross-examination:

In answer to question by pl'ff's counsel witness says: This paper, Exhibit A, was signed at the B g R. Imp. & M'f'g Co's office in Big Rapids. I do not know that I had one in my pocket and Buchtel the other; it may be true that when B was signed I took one out of my pocket and Buchtel did the other out of his. I do not remember how they were taken to Muskegon, but I do remember distinctly that they were not considered as completed between us; that was our conversation and understanding at the time; I think there was such conversation with the officers of the company at Big Rapids, and the balance of them would so recollect it, I think; we talked it over at Big Rapids and it was not to be considered completed till we had gone to Muskegon and had it fixed satisfactorily to Mr. Buchtel. It was for our benefit that we might cut
80 the lands, and for Mr. Buchtel's benefit as security; that is what he was looking for, mutual benefit, as I looked upon it.

Q. Don't you know, sir, at this particular time, that Mr. Eldred stood ready in Muskegon to take these lands at the very same price; didn't you know it at the time?

A. I had thought that from what Buchtel told me at that time that he was, but was informed afterwards that it was not so by Eldred, at the Occidental.

Q. (By the Referee.) Where were you on the 23d; that is, the date of A?

A. I think at Saginaw; that is, the date of the contract. We came to Big Rapids and executed it on the 24th; I think the next day we reached Muskegon.

Recross-examination:

Q. Where did you go from to get to Saginaw?

A. From Big Rapids to Fort Wayne, from Fort Wayne to Akron, Ohio, thence to Cleveland, thence to Toledo, Sandusky, thence to Saginaw to see Buchtel. I thought at the time that Eldred was chasing Buchtel up to get the same land, but I learned I was mistaken.

Redirect examination:

81 I remember having the contract Exhibit D before Buchtel at Mason's office; whether I showed it him before or not I cannot swear positively, but I told him what I was doing and proposed to do in the matter, and from the best of my recollection we looked it over together before; I remember distinctly we read it over together at the Mason Lumber Co's office at the time Ex. B was executed; the parties were all present and heard it read.

Further examination of BRONSON for def't:

At Saginaw on the 23d Sept., 1874, it was agreed between Buchtel and

myself to go to Muskegon and have Mason agree to pay him the $2.50 stumpage on that land at the same time the mortgage was agreed upon and executed. This part of the business was first fixed and agreed upon between Buchtel and myself at Saginaw before the transaction was agreed upon completely as regards the other; after this first part was agreed upon we went into the other room and talked over the schedule A lands; he and I went to Muskegon for that purpose and for the purpose of consum'ating the other agreement. I never informed Buchtel or any other party that I had ever been on any portion of the land in 21, 7, prior to that date (Sept. 25th, 1874).

82 Cross-examined:

This stumpage matter was all talked over, as I have stated, at Saginaw between Buchtel and me in the office of the gentleman who drew the papers; I think in his presence, and I think his name was Gage.

SAMUEL TIFFANY:

I reside at Muskegon. Know the def't; know Lyman G. Mason. My business is scaling logs; have been at it 15 or 16 years. I know the lands described in Exhibit A. I scaled the logs cut on those lands last winter. Green & Mason put in the logs on sect. 24, Aaron Miller on section 8 & 18; I did the scaling on both jobs. The total No. 1 and No. 2 logs on those jobs was 1,162,543 f't; I have the tally-sheet with me made from that scale. (Tally-sheets rec'd in evidence marked H 1, H 2, H 3, H 4, H 5.) I scaled all that was cut and skidded on those lands; these scale-sheets correctly state the quantity of No. 1 and No. 2 logs skidded. I should say there was of the lands cut over perhaps 10% of the timber worth-
83 less, both cut and uncut. That is about the general average of worthless pine in that quality of pine; of the same quality of timber on 21, 8, the proportion of worthless was about the same and the proportion of No. 1 and No. 2 was about the same. No. 1 logs were stamped with clover leaf on the end, No. 2 marked House and N. O. T.

Cross-examined:

I did this scaling for the Mason Lumber Co. The scale-sheets are in my handwriting; I filled this blank from the original figures and part of it has been compared since. These are not the original figures; they are the figures I made from my memorandum at the time of scaling (witness explains to counsel how he scales logs by straight marks in the proper column in the scale-books), and I make my scale-sheet from this scale-book. I sent my reports to the Mason Lumber Company of the scale. I think there was no timber cut down that was not scaled; there may have been occasionally a tree through the woods; there may have been 3 or 4 per cent. of trees cut down and not cut up; I made no estimate at the time. The balance of the ten per cent. I have
84 named would be the rotten logs that were not cut and some that were cut. I scaled some logs with defects in them; made deduction for the defects. We used Scribner's scale. Another scaler could take my scale-book and tell by looking at the logs what deduction I had made, as the No. of feet would be marked with a lead pencil on the end of the logs. The amount I scaled there was 1,162,543 feet. L. G. Mason had a part of the logs I scaled in 21, 8. McNiff scaled in 21, 8. I scaled about 1,000,000 in 21, 8; a part was marked N. O. T., a part clover leaf triangle No. 2, part with a house mark; those McNiff scaled marked O. X. S., part [S S]. The clover-leaf logs on 21, 8, were No. 1 logs. The O.

X. S. belonged to Eldred; [S S] I think to Bronson. The other marks to Mason Lumber Co. I marked some logs N. O. T. in 21, 7, and scaled them, those scale sheets show; I supposed those last named belonged to Bronson; there were 58,019 feet of them, and is included in the gross sum I have named. In scaling, the amount which is upon the scale-book is dependent entirely on the judgment of the scaler; he scales the logs sound; you cannot detect the scaler's errors without a rescale.

85 Redirect:

Witness looks at the colored portions of sections 8, 18, & 24, on Exhibit C, and says: That appears to be the location on the sections I scaled. A portion that I scaled in 21, 8, was from certain railroad lands Bronson had obtained after the Eldred lands were scaled.

Recross:

I know nothing about the lines of those lands. There was something over 600,000 feet on the railroad lands and 377,000 off the Eldred lands No. 1 & 2 logs. Of the N. O. T. logs on 21, 8, def't had nothing to do with 167,000 f't.

WILLIAM BUCHTEL, the plaintiff, called on rebuttal, in answer to questions put by counsel for plaintiff, says:

The contract Exhibit A was drawn at East Saginaw but not completed. Drawn by Col. D. W. C. Gage on the 23d Sept., '74. On the 22d Sept., '74, I rec'd two telegrams from Bronson; one from Akron, Ohio, the other from Cleveland. The Cleveland one was signed by my brother.

86 Same day I rec'd two telegrams from Eldred; one from Akron, Ohio, the other from Cleveland. On the morning of the 23d Sept., '74, Bronson came to see me at Capt. Gardner's, in East Saginaw. He said he understood that I was dissatisfied with the sale of lands I had made to him—other lands. I told him that I was, and wanted him to secure me for those lands. He replied he would if I would sell him these lands on 21, 7, described in Exhibit A. He then and there told me the Big Rapids Imp. & Man'f'g Co. was worth $250,000.

(Here the referee noted an objection for def't as to all this class of testimony as being immaterial and irrelevant, and exception for defendant.)

I told him I wasn't satisfied and wanted him to secure me on those lands in 21, 8. He proposed a mortgage on those lands, Eldred lands, if I would sell him those in 21, 7. (Witness identifies the mortgage.)

(Mortgage received under defendant's objection and marked Exhibit G.)

His proposition was to give me a mortgage subject to the Eldred contract for 2½ million feet, and the first payment due on that land contract he would pay when it matured, and for the 2d payment

87 coming due he would assign to me the two payments on the Eldred contract; i. e., the first payment he would assign to me and so much of the 2d pay't as would pay the note coming due upon that purchase. Gage drew up a contract, but Bronson would not sign it until he drew up A. He would not sign G until A was drawn. Then when A was drawn he refused to sign it with the clause in it prohibiting the cutting of timber; another clause was added, that the logs should be marked a certain mark, and we retain our lien on the logs, but he would not sign it, &c. Col. Gage in the afternoon drew up A, under my instructions. Bronson then said he would like I would go with him to Big Rapids that afternoon; as my mortgage was not signed I went there to have that completed. I went with him and to his house and went to

bed. The next morning, the 24th, I went with him up town, took quite a walk to his dam and mill, and when we came back went to Brown's drug store, and Bronson said he had just got a letter from Mason and said he would sign the mortgage if I would sign A, and we did so,
88 and the papers were executed that day at Brown's drug store. I took the mortgage and one duplicate of A. He then wanted I should go with him to Muskegon. He wanted that clause stricken out in relation to the cutting of timber before the signing; he asked this at Saginaw and Big Rapids. I told him no, unless he would secure me he could cut no timber. He went to Muskegon that afternoon. The import of the letter was that Mason wanted to make a contract for logs. We got to Muskegon, stayed at Occidental, and Mason was said to be at Grand Rapids. Next morning after breakfast he introduced me to Mason at Occidental Hotel. Before going to Muskegon Bronson told me if I would go maybe he could make arrangements to secure me and I could give him permit to cut timber on the A lands. I think Mason and Bronson then had an interview; I didn't interfere. I made a few inquiries in regard to the responsibility of the Mason L. Co. that morning and visited the mill, &c. Nice dry kiln. Between 7 & 10 a. m. I went with Bronson to Mason's office. Bronson and I had been together all the time. I think that Mason came in soon after we went in. I then
89 stated to Mr. Mason that he perhaps was aware that I had sold to Mr. Bronson some lands, or the Imp. Co., and that he was anxious to cut them, and wished me to go down to see whether there could be any arrangement made whereby I could give him permission to cut. I think we were in the east room in the office. I then told Mason from what I had learned and seen that if he would guarantee the payment of this contract A, I would give him permission to cut the timber. Mason then said that he and Bronson had some business that they wished to talk over privately and I left the office, went to the mill, stayed around perhaps half an hour, then went back to the office. Bronson and Mason were in possession of that private room. No one else had been in there. I know Monroe; he had not been in there prior to my going out, and no papers shown prior to that; when I returned I stopped awhile with Monroe in his room in the office and looked at some brine. I was then invited into the room, I think, by Mason; am not sure. When I got in Bronson met me and said we have now fixed an arrange-
90 ment so that we can have it all fixed up. Mason present; and Mason then went to work and drew up this paper or wrote it in pencil; this Exhibit B. He then read it over and I told him I thought it would be satisfactory. He then called Monroe into the office and handed him the draft of it and told him to copy it. Monroe took it and went out and we sat there. By the way, when I came back this second time I saw this plat C there. It was spread out on Mr. Mason's table, and another plat of 21, 8. I had not seen the plat prior to going into the office; while we sat there and Monroe was copying the papers, Mason asked me if I had any lands up there. I told him I had, and we looked at a map—railroad map—I had no plats with me; we were talking loud while he was copying this. While this copying was going on there was nothing said with regard to the lands in A until about the time of signing the instrument Exhibit B, when Monroe brought it back into the office—Mason's office. I took one of these A's out of my pocket and I attached a copy of B to it. Mason then spoke and said that he supposed that this would be all right if the quantity of timber was on the land, and I said, judging from the anxiety of Eldred and Bron-
91 son to get it I thought it was a good thing, though I had never

seen it. I had never seen the lands; nothing else said on that subject. I should say Monroe was absent making the copies 10 or 15 minutes; but a short time. I think B was signed about 11 a. m. When B was signed and attached to A, I took one and put in my pocket. I then got up and told Mason I would like to see him, and we walked out together, and went into his barn and sat down. I then told him I had understood in some way that he was to get timber off the first purchase, and that I had a mortgage on that land of Bronson, and proceeded to tell him. He said he was glad I told him. We then went to the salt well; then to the office, and he drew up this, or drafted it, and we sat right there till this was drawn up, read over, and signed. I think Bronson was present. I took one copy and Mason the other. No other contract was looked over or talked about after we came this last time. This was done about 12 noon. I went to the hotel and took dinner. Nothing up to this time had been said to me, or in my presence, about quantity of timber, except the remark I have stated that Mason made about the time Mason
92 handed me A & B attached together, and no reference to plat C, by them, in my presence, or by me, up to this time, excepting when I made the remark to Mason "that, judging from the anxiety of Bronson & Eldred to get this piece of land, it must be a good thing—was a good thing." Bronson, then speaking, said he had it all looked over, and told Mason. Didn't go to def't's office after dinner that day. Don't think I saw Bronson and Mason together again that day. I had no talk with them together after that.

Q. Where did you go after that?

(Objected to for defendant—incompetent. Objection overruled, and exception taken for defendant.)

A. I went with Eldred to his mill, towards the mouth, and stayed with him till supper was over, and got into his buggy and drove to the hotel and had supper. After supper I interviewed Eldred on stoop of hotel. I left town on evening train; can't say what time. Did not go again to def't's office. Prior to seeing Plat C in Mason's office, I think it was 18 months or two years that I had not seen it. C had been
93 out of my hands so long that I would not like to state in regard to the figures upon it. I copied the figures from this plat into my plat-book, and these figures do not now agree with the book. At the time, I made the copy correct. That was three years ago last August. That plat was in my hands all the time till I gave it to Miller, and had not been altered when I handed it to him. I made no reference, as I remember, to C at defendant's office. Don't remember having it in my hands that day. I had never visited these lands prior to Sept. 25th, '74. I knew nothing of the quantity of timber on the lands, only from report of what was marked on the plat. I didn't know anything of my own knowledge—anything about it.

(Witness here identifies his own plat-book, in which he made the copy of the figures.)

Q. Turn to those pages which represent the lands marked upon the plat, in sec's 8, 18, & 24, and state as to what figures you find there having been copied by you from that plat to that book at the time you speak of, and state if there is any difference between those figures as they appear on the book and as they now appear on the plat.

94 (Objection for def't as immaterial, irrelevant, and incompetent for a party to show his own acts.)

REFEREE. You claim he produced a plat with these figures on it?

Mr. CHAMPLIN. Yes, sir.

REFEREE. He claims that he did not produce any such plat. I think I will take the testimony, subject to the objection.

(Objection overruled, and exception taken for defendant.)

A. On sec. 24, the estimates are 1,200,000; on sec. 18, 1,900,000 ft., and on sect. 8, 800,000. The timber is marked good. I copied these figures from this plat. The copying was done when I bought the land. I copied the estimates from the plat onto the book.

(Plat-book submitted for inspection, and figures offered and rec'd.)

Witness further says, in answer to question: I never owned sec. 4. I supposed I did till I examined my plat-book, about 3 years before the execution of A. The first intimation that I had that I could dispose of the A lands to Bronson was on the 22d Sept., '74, at East Saginaw. I had had no talk prior to that with Bronson that I could or would sell him those lands.

(All this talk with Bronson taken subject to objection by def't.

95 Testimony allowed to stand, and exception by def't.)

I was going to say Bronson did not ask me at my place when he bought the first lands. I did not go to East Saginaw on the 22d to sell those lands to Bronson. I got an impression, or understood from some one, that Bronson was making a contract at Muskegon with def't to cut their lands on 25 Sept.

Q. As to whether, at Big Rapids, prior to your going to Muskegon on the 24th Sept., you had been informed by Mr. Bronson, or by any other person, that such a contract was extant?

(Objection by def't as incompetent. Obj'n overruled, and exception for def't.)

A. I didn't understand there was such a contract, but I did understand that he was trying to negotiate for one—to make one; that he could make one if he got the permit to cut. There was no understanding or talk that the contract A was to have something further done to it, when we got to Muskegon, to complete it. It was at Bronson's suggestion I went to Muskegon, and for his benefit.

Q. State whether, subsequent to the execution of this contract B, you had a conversation with Mason in relation to the payments on contract A.

96 A. I did have an interview with him.

Q. When and where did that interview take place, and what was the subject of the conversation, as near as you can?

(Objected to for def't, as incompetent to show what Mason said with reference to this matter, and, if material, was a part of pl'ff's original case, and def't not bound by what Mason may have said at that time. Objection overruled, and exception for def't.)

A. I had, at Muskegon; cannot give the date; about the middle of January, 1875. I had a talk with Mason in regard to the first payment then past due. He told me they had been making pretty large advances. I said to Mason I should like to have the pay't that came due Jan'y 1st. He said they had been making advances on logs, and that he had made arrangements with Bronson that he was to pay me $1,000 out of the Feb'y 10th pay't; $1,000 out of each pay't, until this first pay't was paid. I made no representations at the interviews at Mason's office on the 25th Sept., as claimed by Monroe in his testimony, as to the quantity of timber on the A lands, nor as to the figures on the plat C, nor any like representations thereabouts.

97 Cross-examination:

In answer to questions by def't's counsel, witness says: I think

the conversation I have last referred to in chief was about the 16th Jan'y, '75. I cannot say when Mason first claimed the timber did not hold out on the land. He spoke of it in March, but I think he wrote about it before that.

Witness is shown his own plat-book again, and he says: The writing in pencil there is mine. I wrote it and made the figures. I did not make the footing figures. They were made by George Crouse. Crouse was partly interested in the lands. I did not write the word "sold." I did not own on sec. 4 when that was written. I got plat C from my grantees; that was Louis Miller, Jacob Miller, George W. Crouse, and John R. Buchtel. I cannot say how long I owned the plat-book before I discovered I did not own sec. 4. I think Crouse discovered that, and think he wrote the word in pencil "sold." That page is the same as it was when I took the book. The figures I put there in pencil have not been
98 altered to my knowledge. I had no one look at these lands to see how much pine there was; 3,000 acres had been looked, but not for me. I never saw these lands. I bought them from these estimates. Bently put these estimates on plat C. He purported to have located the lands, and when they came into my hands they had the figures on the plat the same as I have transcribed them into the book. I did not change the figures from 1,700,000 to 1,900,000 on sec. 18. I first wrote it 1,900,000.

COUNSEL (to referee). Look at that now, and you will see that it was 1,700,000, and has been recently changed to 1,900,000. This book has recently been in Taggart's office. I showed Mason this book since this suit commenced. He took down the estimates. I cannot state whose figures the 1,200 are on sec. 24. I suppose them to be Bently's. I did not have this plat at Saginaw, nor this plat-book. I did not exhibit any plat to Bronson there. That plat has never been in my hands since I gave it to Miller. I don't remember seeing plat C when at Saginaw. At home I had a pocket plat-book. I think Bronson had a description of the lands at Saginaw. I don't recollect what we used to get
99 the description from at Saginaw. Bronson may have had plat C there. The words "cork and sap," written on plat C, I think is Bently's. The figures 680x18, at the bottom of C, I don't know whose they are; they are not mine. Bronson and I agreed upon the price per acre at Saginaw, $18.00, and figured up what it came to. I don't know if the figures on plat C were made at that time; they are not mine. Bronson refused to execute A till he got to Big Rapids. I went to Big Rapids to get the mortgage executed. I went there to get security on the lands. I had sold Bronson without security on lands in T. 21, 8, and went to Muskegon at his request. Before leaving Big Rapids I had an idea of having security from def't if they were responsible. The sale of the A lands was a complete and absolute sale before we left Big Rapids. I had an opportunity to sell these lands to Eldred for part cash. I think Eldred was good. The reason I sold to Bronson instead of Eldred was, Bronson would secure me on the Eldred lands if I would do so. No understanding between Bronson and I before leaving Big Rapids that he should get def't to give further
100 security on the Eldred lands. There was nothing said between Bronson and I about the mortgage matter. I told Mason, after the other matter was closed up, that I held a mortgage on the Eldred lands; that I had understood, either by Bronson or Mason, that def't was to get some logs off them. He said he was glad I had told him. This was after we had completed Exhibit B, and I had it in my pocket. Mason and I were at the barn and had this talk. I didn't know what he

might do about guaranty if I went with him, Bronson, to Muskegon. He, Bronson, said he could get a contract to sell some logs, and wanted me to go with him to see if he could make some arrangements and get a permit to cut on those lands. I did not know that Bronson had a contract to sell the logs. I understood him to say that he had just read a letter from def't, and he was going to sell def't 4,000,000 feet of logs, or some amount. I don't remember if, when in def't's office on the 25th Sept., anything was said about my not being the owner of sec. 4. I know nothing about the substitution of section 24 for sec. 4. I think that I had never represented to Bronson that I owned sec. 4. I
101 did not make the figures 1,000 on sec. 4. Don't know how the "1,000" came on sec. 24. Was not there when I made the copy. I did not put them there afterwards. We met at def't's office between 9 and 10 a. m. of the 25th Sept., '74. After I got into the office, I told Mason that I had sold Bronson some lands, and he was anxious to cut them; that he was anxious I would come down and see if some arrangement could be made to give him a permit to cut, and I told him, from all the information I had got of their business and responsibility, I was willing, if they would guarantee that contract, to give him permission to cut the timber; give the Mason L. Co. permission to cut. I understood Bronson was to put the timber in—that was my impression—and I was to give the defendant permission to cut. I understood the Mason Lumber Co. took the lands—that Bronson was going to assign his contract, and it stepped into his shoes. I have stated that after making known my business there, Mason drafted Exhibit B in pencil, by which I claim he guaranteed the payment in contract Exhibit A, and about the time B was executed and handed me, Mason made the
102 remark it would be all right if the timber held out. I think this remark of Mason was not before the execution of B. I think Mason attached the two together and handed them to me, and then said this will be all right if the quantity of timber is there.

Q. You think Mason has engaged to pay $12,000 and upwards, without raising the question as to the quantity of timber till afterwards?

A. I can't tell you what I supposed. Mr. Bronson had told him. I have no recollection that before execution of B he asked me how much timber there was on the land, and I, or Bronson in my presence, told him how much there was. I recollect distinctly he made the remark, if the amount of timber was there that this would be all right. I had no idea what he referred to. I think plat C laid on the table when I came back to the office, after I had been in the office that first time, and I had not examined it, nor looked at it. As Mr. Bronson knew I hadn't seen the land, I supposed Bronson knew all about it. I don't remember when I first discovered the figures on my book and on C did not
103 agree. I discovered it in the Mason House last winter. I think Bronson showed it to Crouse. I then discovered the amount had been raised on 24. It is not a fact that I took the amounts from Muskegon and compared them when I got home. I have not told any one that was a fact. It was later, I think, in March; am not sure if in March or January; I don't remember. I told Mason of the fact, but I cannot say when. I told him here the other day.

Q. Do you not know that Mason, in behalf of the def't, entered into this agreement B on the strength of the quantity of timber designated and marked on Exhibit C, as they appear there to-day?

A. I don't know, sir, from my own knowledge, whether I did or not.

Q. Didn't you know that, at the time this plat C was exhibited in the

Mason Lumber Co.'s office at the time Ex. B was executed, that that was produced there as your plat?

A. I think I saw the plat there.

Q. Didn't you know that Mason was informed that that was your plat?

A. Well, I supposed he was, but he was not by me. I supposed he was. I only know that Bronson said he had looked the lands over, and I supposed he told it.

104 Q. Did you represent then that there was the quantity of timber on the land which you have testified as having taken from the plat?

A. I did not, sir. I could not state what there was. I made no representations as to the amount of timber. All the representations I did make was that I judged it a good thing from the anxiety of Bronson and Eldred to get it. I did not furnish the figures on that plat to Bronson. Bronson made no representations as to quantity of timber on these lands in my presence that I recollect of. I don't remember that at the time I thought them correct but afterwards found they were not. Bronson told him in my presence that he had looked the lands over and knew what it was. At the time I made the remark, "I thought it a good thing." He did not state, in my presence, how much there was. I left the office after first going in and before Exhibit B was signed; was gone half an hour. I went out after I told Mason I would give them a permit to cut if they would guarantee the payments of the contract, and he stated he and Bronson had some business, and intimated it was

105 private, and when I came back this paper was drawn up. After I came back this was written. Bronson told me he had made an arrangement and assigned his contract over to secure Mason, and he would guarantee the payment of it. Nothing said after I came back about his becoming security on contract A. I was gone, perhaps, half an hour before returning. I sat down a short time with Monroe, and they invited me in. I learned somewhere, I don't know where, that they claimed that there was on those lands 2,200,000 feet of timber more than my plat-book showed. I can't say where I learned that fact. When I did, I referred to my book to see if it was correct. I was at home at the time. As I understood, defendant took an assignment of contract A as security. I did not consider the goodness of the security would depend upon the quantity of timber upon those lands. At the time I sold this land I supposed they were getting timber off the other piece, and I supposed it had the amount of timber that was estimated on it; but I didn't know then what the estimates were. I had no plat-book with me. I went to the Eldred Mill right after dinner, and stayed

106 at the mill with Eldred all the afternoon. I think those marks below the section on plat C have been put there since I had the plat. On section 18, they are marked up 1,000,000. Section 8 should be 800,000, instead of 1,800,000. I think sections 8 & 18 on the plat were marked as I have them marked in my plat-book, (i. e.) some of it was marked cork and sap, and good farm lands, some of it G. F. I cannot see that any figures have been rubbed out on sections 8 & 18. I do not recollect the conversation with Thomas Monroe, after my return from the Eldred Mill, to the effect that I had been to see some of Eldred's good lumber. My recollection is, Eldred drove me right up to the hotel, which I did not leave till I went to the depot. I don't know that we got back a long time before supper. I think the train left about dark. I saw Eldred's son at the mill, and G. W. Robinson.

Q. Didn't you know at the time Mason was signing Exhibit B that

the def't had a contract with Bronson for the pine on the Eldred lands?

107 A. I did. I got that information some way, but I don't remember just how. I don't know why I did not inform Mason of that before he signed Exhibit B. It occurred to me just after the thing was done, and I took him out and told him. We went to the barn, saw horses there, didn't look at them. Saw a man there cleaning the harness or something of that kind. I think we sat down in the harness room. I don't think the other man heard the conversation. This was about 11 o'clock a. m. The conversation with Mason, about the first of Jan'y pay't, on or about the 16th of Jan'y, was in Mason's office, and Crouse was present. I don't remember that any one else was present. This was before I went to Big Rapids. Crouse was not interested in the lands, but was in the avails of them. I don't know that I have Mason's letter of Feb'y 27th. I received such a letter from him.

(Copy of the letter produced and marked Exhibit I. Letter from Buchtel to Mason, of March 3d, '75, introduced and marked K. Another exhibit, marked L, introduced.)

Exhibit G is the mortgage of the Eldred lands I took on the
107½ 24th Sept., 1874. I was satisfied with that security. Had no idea of obtaining any further or different security on the Eldred lands. Carried that mortgage to Muskegon with me. Did not record that mortgage till I got the stumpage security of $2.50 per M upon those lands from def't. I think I showed the mortgage to Mason at the time. It was recorded the 28th of October, 1874. I never have received anything on it.

Q. Now will you state how it came about that Mason, in Exhibit F, agreed to pay you stumpage of $2.50 per M for such logs as he should get on that contract with Mr. Bronson from the Eldred lands if there was no figuring done in the Mason Lumber Co.'s office upon that occasion, as you have testified to?

A. My recollections now are, when Mason and I went out I showed him this mortgage, Exhibit G, and told him what my relations were in that regard. I think I made a full statement of the whole transaction between Bronson and myself with regard to the first sale that I made to him. I told Mason I should not let Bronson cut timber covered by
that mortgage unless the $2.50 M stumpage was secured me. I
108 told Mason I was satisfied there was 5,000,000 feet of timber on the Eldred lands. This was at the barn. Eldred was to have 2,500,000. I supposed those lands were good security to secure Bronson's pay'ts on the Eldred purchase after Bronson had taken care of the first payments, i. e., that there was enough timber after Eldred cut his to make me good on the purchase. I got that estimate from the estimates of one Lux. It was not copied on my plat-book. I now recollect there was some talk about quantities of timber there that day with Mason, but it was confined to the Eldred lands. I fixed the price per acre in both towns alike, and at that time regarded both towns about the same quality and quantity. I think I had these lands in both towns in my pocket plat-book. It had no estimates of quantity upon it. I don't know how I got at the amounts as to quality and quantity to fix the value. I don't remember how many copies of Exhibit F were made. I started for home on the evening train on the 25th of Sept., 1874. Saw Bronson at the depot when I left. He went with me to Grand Rapids.

109 (Telegraphic dispatches from Buchtel to Mason Lumber Co. rec'd in evidence, marked Exhibit N.)

I was at Muskegon the 14th of Jan'y, '75; went thence to Big Rapids;

sent the telegram Exhibit N. I did not go to Big Rapids at that time for the express purpose of getting Bronson to turn out to me the Eldred contract to apply on the first payment mentioned in Exhibit A. I wanted it to secure Bronson's note due in Jan'y on the 21–8 lands. I sent that telegram for him to look after his interest. He had no interest in 21–8, but he, Mason, had in the other, and told me I should see how matters were running as near as I could and let him know, and I did. Telegraphed him, then wrote him when I came back from the camp (Miller's logging camp).

Redirect:

I have no other plat book; never had any other except the pocket one named. Don't think Crouse has any other. At the time of sending the telegram I went to see Bronson and get him to pay me the note due Jan'y 1st which I had against him on the Eldred lands. I tried to get Bronson to pay the first payment on this trip. There was no
110 connection between the Jan'y pay't (1st note) on the Eldred lands and the first pay't on contract "A" lands, and it has not been paid. There was no security on that. The amount of that note was for about $3,685.00, and the interest thereon at 10 %.

Further cross-examination of Buchtel:

When Bronson was at Akron and made the first purchase of me, I exhibited to him a set of plats, but not a plat of 21–8 nor of 21–7. Can't say from what we made the estimates of the pine on that occasion. Bronson said he had looked the land over in 21–8. This was in July or August, 1874.

ELISHA ELDRED, sworn for pl'ff, in answer to questions, says:

I live in Chicago; in the lumber business; know the pl'ff and def't; know Stephen Bronson and L. G. Mason.

Q. Will you examine Exhibit C and state whether you ever saw that before, and when and where you saw it, and by whom it was exhibited to you, and whether it now compares in all respects with its condition at that time?

111 (Objected to for def't as irrelevant and incompetent. Objection overruled and exception for def't.)

A. I could not swear exactly to this map. I recollect Bronson showing me a map. I made no mark upon it so that I could not tell it. Bronson showed me a map at Big Rapids one time of some lands he was going to buy of Buchtel. This looks like the map. It was either in August or Sept.; fore part of Sept., 1874.

Q. Previous question repeated.

(Same objection as before. Taken subject to objection. Testimony allowed and exception for def't.)

A. I cannot swear that this is the identical map. It was similar to this. The section 24 upon it hadn't as much timber marked upon it as appears at present on this one. There was a million feet difference.

Q. What did that plat that he then showed you purport to be a plat of?

(Same objection by def't. Same ruling by referee. Objection overruled and exception for def't.)

A. Town. 21 N., R. 7 N. This was after any purchase of the lands from Bronson in 21–8. I was in Akron, Ohio, in Aug't or Sept., 1874. Did not see Buchtel there; saw the plat-book. Crouse showed it me, the same plat-book in evidence.

112 Q. I direct your attention to the lead-pencil entries as to the

amounts on the several sections in the book which you examined; did you see such entries as these? I mean the figures on the right-hand bottom side of the page.

(Objection for def't; immaterial and incompetent; same ruling as last above. Testimony allowed and exception for def't.)

A. Yes, sir; and made a memorandum at the time, and have that memorandum before me now. (Looking at the memorandum.) I think this the same book I saw there. The figures correspond, except I see there is an alteration of figures, which I got down 19 M on my book, which here looks like 17 M. I made a correct copy at the time I speak of.

Q. Please read your copy to the referee.

(Objection for def't; immaterial and incompetent. Taken subject to objection. Objection overruled and exception for def't.)

A. Section 24, 1,200,000, cork and sap; section 18, 1,900,000, cork and sap; section 8, 800,000, cork and sap. From Akron, Ohio, I went to East Saginaw, thence to Chicago. Saw Buchtel at Saginaw,
113 and saw Buchtel at Muskegon some days after. Saw Bronson same time at Muskegon. Can't state what day of the month. Saw Buchtel and Bronson together in the morning. I took an early dinner at my mill. I drove up and took Buchtel down to my mill in the afternoon; stayed down at the mill all the afternoon. I brought him back to the Occidental just before supper time. I left my horse at livery stable and came back. Could not say where Buchtel was when I returned. Saw Buchtel that evening after supper. I think we took supper together, but am not sure; we were on the stoop after supper.

Q. Whether about that same time you were desirous of purchasing these same lands in 21–7?

(Objected to for def't; immaterial and irrelevant. Taken subject to the objection. Objection overruled and exception taken for def't.)

A. Yes, sir; I would liked to have bought them, and so told Buchtel, if Bronson did not buy them.

Cross-examination:

In answer to questions by def'ts' counsel: It was at Saginaw I
114 told Buchtel I wished to buy the lands if Bronson did not. Have not seen the plat-book till now since I saw it at Akron. Have no recollection of any alteration of the figures when I saw it at Akron. My figures are 19. I told Buchtel to-day about my having taken the figures at Akron, and gave him my amounts. Crouse showed me the plat-book at Akron. I have no means of identifying it; the size and general appearance is the same. I took other memorandum from the book. My woodman had seen these lands and I was desirous of getting them. My woodman had not seen section 24, and did not examine them as to quantity but as to quality. I supposed the estimates I had from the plat-book were correct, and they footed up 3,900,000. Buchtel told me the price per acre was $18.00. My desire to purchase these lands was based upon the quantity estimated and the price he asked for it, from what my man told me as to the quality of timber; if upon examination I found there was 3,900,000 feet on it; I would have taken it; would not have relied upon representations of quality and amount without a guaranty or something of that kind.

115 AARON MILLER, sworn for pl'ff, in answer to questions, says:

Q. Did you go upon these lands in town. 21–7 in Sept., 1874, for the purpose of examining the timber?

(Objection for def't; immaterial. Taken subject to objection. Objection overruled; exception for def't.)

A. Yes; between the 5th and 10th, 1874. It was before I went on the lands with McHenry, as he has testified. McKinnon and Judd Robinson were with me. Robinson and I examined on section 8, and Robinson, McKinnon, and I went onto section 18. I went to visit the lands with a view of putting in the timber. I did put in the timber on 8 and 18. Went at Bronson's request.

Q. State how it was as to being rotton.

(Same objection for def't as last above; same ruling by referee; objection overruled, and exception for def't.)

A. I should think very near one-fourth, with what deductions and all that would be made; as near as I could judge ¼ rotton.

Cross-examination:

In answer to questions, witness says: I never saw a piece of land that turned out so much rotton. I never cut any of the same class of
116 timber as I know. I have had 19 years' experience seeing timber cut. My estimate is large, very large, but I think it is what it would actually cut rotton. There is more or less rotten timber in all tracts.

Q. And that is taken into consideration in making the estimates?

A. You generally estimate what sound pine there is; we calculate to estimate what sound timber there is.

Q. If you should go into the woods to report the quantity of timber as well as the quality, would you take into account and make deductions for rotten timber?

A. Yes, sir; in looking at such a tract as this I would take into consideration the unsound timber. This timber did not cut as sound as it looked. It was too old. You cannot tell really how timber will cut till you cut it. I can tell from looking at it whether it is going back or not. (Witness describes how it would look). I cut all the timber on this land, as near as I could, without its being surveyed. I do not say there was one-fourth of the timber left on the ground; a good many logs that were badly defective; some that were taken for half, and some for just what was in them. They were scaled so as to make sound timber.

117 DUNCAN MCKINNON, sworn for pl'ff, says:

Have been lumbering some years.

Q. State as to whether some time in Sept., 1874, you accompanied Miller on some lands in town 21–7.

(The answer to the question taken subject to objection, as irrelevant and incompetent for def't. Objection overruled and exception for def't.)

A. I did; between the 5th and 10th. I went at Bronson's request, with a view of putting in the pine by the M. Am not sure that I have heard them called the Eldred lands—these 21–8 lands; I looked over sect. 2.

(Objection overruled and exception for def't. This testimony taken subject to objection.)

I estimated the quantity upon the lands I visited and told Bronson the estimate within 24 hours, I think at Clam Lake. I can't give my estimate of the different lots. I took his estimate according to what he had on his plats, and my estimate was just ½ as much in both towns, and so informed Bronson. That would make about 6,000,000 feet in both towns. The pine on the two sections was old and should have been cut 50 years ago. I think Bronson at this time was on sect. 4 in

21–8. I informed Bronson, as I have stated, on or before the 15th of Sept., 1874.

118 Cross-examination:

I visited sect's 2 and 4, and sect. 9 in town. 21–8, and I looked over section 18 in 21–7; that is all the land I looked over. My representation to Bronson was with respect to all I had looked over. (It is admitted that section 9 is no part of the lands in this case.) I cannot tell you what the figures were on the plat, on the lands I visited. I simply told Bronson it would be ½ what he had on the plats. His estimate was 10,000,000; mine 5,000,000. My estimate was 5,000,000 on sect. 18 in 21–7. Sect. 9, 4, 2, & 8 in 21–8.

Redirect:

I did not visit section 24 in 21–7. My estimate included all the lands in that section. I did not base my estimate upon actual examination of all the lands, but on 3 or 4 sections in the two towns. I found that it was going to fall far short of his estimates and based the others on what I had looked at. I did not look at sects. 8 or 24. I grouped the lands altogether. I have never seen secs. 8 and 24 in 21–7. Been in the lumber business for 8 or 10 years. If I were buying pine land
119 to-day I should have assistance in estimating it. That was my first acquaintance with Robinson.

L. G. MASON, recalled on rebuttel for def't's rebuttel, says:

The first time we went to the barn—it was not a great while after we first met, and had a sort of general talk in the office, and Buchtel nodded me out, and we went out. No conclusions were arrived at previous to the scene that he related in the barn. No papers had been drawn; that I am sure of as I am sitting in this chair. I refer to the time Buchtel says he spoke to me of the mortgage upon the Eldred lands. There was 2, and I think 3, copies of Exhibit F, 1 for each of parties. Haven, the bookkeeper, made the copies. It would take ¾ of an hour for each copy. I saw this plat-book of Mr. Buchtel's in this city about the time we commenced this trial; saw it in this office. Examined the descriptions of lands named in Exhibit A. Buchtel handed me the book, I think. We looked it over together. I examined the quantities as set down in pencil on the plat-book, and made minutes of it at the time; took the amounts down in Buchtel's presence. Section 8 read
120 800,000; section 18, 1,700,000; 24, 1,200,000. I compared the figures with those on Exhibit C, and found the difference 2,000,000 feet; that 24 and 8 had been raised each a million. Buchtel and I talked about it at the time. I heard the testimony of Buchtel respecting the interview he had with me in Jan'y, 1875, in which he says I promised to make a payment which matured in contract A in installments from month to month. Buchtel is mistaken about my making a promise. I showed him the authority I had from the Big R. Imp. and Ma'f'g Co. for appropriating certain portions of payments that would mature to them under that contract, provided they went on and fulfilled the contract. At the same time showed him a copy of a letter that I had written him, which had probably passed him. This authority is Exhibit L, and the letter is Exhibit E.

(Letter from Buchtel introduced, rec'd, and marked Exhibit O. Letter from M. L. Co. to Buchtel, April 16th, introduced and marked Exhibit P.)

REFEREE. State the facts out of which that telegram arose.

A. Mr. Buchtel was at Muskegon, at our office, and I showed
121 him a letter that I had written of date of Jan'y 13th, and a letter of authority from the Big Rapids Imp. & Man'f'g Co. to appropriate certain amounts of future payments towards the payment of the first installment of that contract. He left for Big Rapids to look after the business connected with that contract; perhaps some other business. I don't know.

Q. Before he went to the Big Rapids, was there any talk between you and him in reference to the Eldred contract that Bronson held, and his efforts to get it? Did he say anything about it; and, if so, what did he say?

A. My recollection is not very distinct. I think it was spoken of as likely to be of value, something to be coming to the Big Rapids Imp. & Man'f'g Co. I don't recollect about that. I think the interview was rather short. I don't recollect distinctly about it.

(Witness looks at Exhibit N, a telegram, says: I cannot recall the circumstances sufficiently explicit to state what he means by the telegram.

Q. Will you state what was the fact as to whether the paper marked Exhibit B was an absolute assignment or security?

(Objected to for plaintiff as incompetent. The paper will have to speak for itself. Objection sustained and exception for def't.)

122 Q. Do you know, and if so, state whether at the time Exhibit B was executed, the parties thereto had any conversation as to whether the contract A was to stand simply as security to the Mason Lumber Co. in case they had to make any payment of Exhibit B?

(Objected to for pl'ff; incompetent. The paper speaks for itself. 2nd, the ground has been gone over by both parties. Objection sustained, and exception for def't.)

I think I next saw Exhibit C in February, 1875.

Cross-examination:

I have no doubt that it was a part of Buchtel's business in going to Big Rapids from Muskegon in Jan'y *was* to see if he could not collect from Bronson, or get him to secure the first note, past due, on the Eldred purchase; but I think also the first pay't on the other purchase, or else he would have had no occasion to write me. If he told me that he was going to the woods, I presume I requested him to write me how they were getting on there. I have no recollection of it, however. I was not trying to get hold of the Eldred contract at this time, and I did not inform
123 Buchtel at that time that I wanted to get it. I took a contract for No. 2 logs, but it was much later than this.

GEORGE W. CROUSE sworn for pl'ff.

I reside at Akron, Ohio. Know pl'ff. Met L. G. Mason once before, in the office of the Mason Lumber Co. in Muskegon, Mich., about the 15th day of Jan'y, 1875. Present, Mason, Buchtel, and myself, and another person part of the time.

Q. Please state what took place between Mason and Buchtel at that time and place in your presence relative to any payments or conversations, or relative to payments upon what is termed here contracts A & B.

(Objected to for def't as immaterial and incompetent. Taken subject to objection. Objection overruled, and exception for def't.)

A. Mr. Buchtel asked him first for money or notes that he could usd

in payment of the pay't then due. Mason 1st replied that Bronson hae been there a day or two before, and that he had paid him that day all that was due him by the contract between Bronson and Mason up to that time, claiming more than was due him; therefore, at that time didn't wish to advance any more, but would pay Buchtel one thousand
124 dollars on Feb'y 10th, and thereafter on each succeeding pay day until 1st pay't made. I was there at Buchtel's request, to aid him in securing several claims.

(Taken subject to objection for def't. Testimony allowed and exception for def't.)

Q. What claims were they?

(Objected to as incompetent for def't. Objection overruled and exception for def't.)

A. 1 claim against Simpson & Norton, of Grand Rapids; 1 against the Big Rapids Man'f'g Co.; another against the Big Rapids Man'f'g Co. guaranteed by the Mason Lumber Co. The first of these was a payment due on land purchased in town. 21–8. I understood the nature of the claim against the Big Rapids Imp. Co. and the one guaranteed by the Mason Lumber Co., and I understood the Eldred contract matter.

Q. Now, then, state what was said in relation to the Eldred contract, if anything, at the time that you and Buchtel had this interview with Mason at his office at Muskegon Jan'y, 1875.

(Objected to for def't as irrelevant and immaterial. Objection overruled and exception for def't.)

A. As near as I can remember it, when Mr. Mason said Bronson
125 had been in his office a short time before, and he spoke of having blowed up Bronson for his misrepresentations, and called him hard names, and that he tried to get Eldred's log contract assigned to him to secure him. but Bronson told him that he had used that contract, and couldn't give it to him. He then took the other security which he exhibited to us on that occasion.

Q. What, if anything, was said at that time in relation to Bronson's having misappropriated the money which Mason had at that time advanced to him in furtherance of this job?

(Objection for defendant; immaterial, irrelevant, and incompetent. Objection overruled, and exception for def't.)

A. I can't give his exact language, but he charged him with both misappropriating and misrepresenting. I remember one thing was representing to him that he had cut some timber from another piece of land not embraced in the purchase, claiming that he had paid for it; that Mason afterwards learned that he did not pay for it, and, therefore, Mason paid for it, giving that in the same connection as one reason why he had advanced more than he expected to advance on the pay'ts then due; that the pine was represented to have been bought from a
126 railroad co. Buchtel informed Mason he was going to see Bronson in relation to the pay't which was then due him on another purchase. Buchtel was to ascertain what had been done with the Eldred contract, and Buchtel was to advise Mason of whatever he learned that would be of interest to him; there was more general conversation which I don't recollect. Mason said he took an assignment of another class of logs to secure his advances; he claimed that Bronson had not used all the money advanced legitimately in the business. I did not go with Buchtel to Big Rapids. I went 2 or 3 days afterwards. Their converse friendly.

Cross-examination:

The papers Mason took as security was on No. 2 logs. Can't say the amount. Can't swear positively what the papers were for as to Mason. I think it was to secure money advanced by Mason to Bronson on some contract which existed between Mason and Bronson for putting in logs. I never saw that contract. All I know about it is what I heard on that and other occasions. I was familiar with the transaction. I had never heard Mason mention that contract in any other manner before.
127 This conversation lasted not to exceed 2 hours. It was in the Mason Lumber Co.'s office. I saw Bronson's receipts and a contract. The receipt was for from $11,000.00 to $13,000.00. I could not say it was $16,000; think it was $13,000. Mason showed this contract for the purpose of showing payments he had made to Bronson on it. All the papers I remember seeing then was the main contract and this subsequent contract. The main contract had the receipts on it. The subsequent contract was an assignment by Bronson to the M. L. Co. of a certain class of logs. I am sure of this. I wish to correct my testimony by saying that Exhibit L is another paper that I saw there. I think very likely we did ask Mason for short paper. I am interested in the result of this suit. I don't think Monroe produced Exhibit L; think Mason did, and think Mason read from his letter-book the letter he had written Buchtel on the 13th Jan'y. Mason did not give the short paper. Exhibit L and the letter of the 13th was shown the first thing after we got into the office. They were the first papers shown. There was another paper produced by Mason. Monroe made a copy of the contract assigning 2d grade of logs. Havn't it with me. I am sure it
128 was Monroe that was there and made the copy. I don't think it was a copy of Exhibit L I took.

THOMAS MONROE recalled for def't:

I have heard the testimony of Crouse and Buchtel as to this interview on the 15th of Jan'y. I was in the room about all the time. Buchtel and Crouse came there and wanted some money on the first pay't of contract A, due Jan'y 1st. Mason told him there was no money coming at that time; that he had been making pay'ts for the Big Rapids Imp. & Man't'g Co., and that there was nothing due at that time. Then Crouse said they could use short paper. Mason said he could not give any paper. Then Buchtel spoke of going to Big Rapids. The Eldred contract came up, and it was understood was a part of the conversation that Buchtel was to go to Big Rapids and have the Eldred contract assigned to him as security, and get any other security he could for the payments due on Contract A. I don't remember of making any writing for them on that occasion; the copying that was done for them was by the bookkeeper. I produced Exhibit *Exhibit* L for them at
129 Mason's request. Mason did not promise to make any payments. He showed the letter of Jan'y 13th. The Mason L. Co. refused to make any payment either in cash or giving paper.

Cross-exam'd:

I should think the interview lasted one hour. It was in the forenoon. I was present pretty much all the time. Principal reason Mason gave for not paying was, we had made payment to the Big Rapids Imp. Co. Did not hear Mason tell Buchtel that he had tried to get an assignment of the Eldred contract.

J. W. CROUSE recalled:

(Plat book that Eldred's attention was called to shown witness.)

I know Elisha Eldred. I presented this identical book to Mr. Eldred in my office, and he took out his memoranda book and copied his description, as he called it, and the estimates from the book into his memoranda book, on or about Sept. 25th, 1874.

The said issue was then submitted to the said referee, and he found the said plaintiff was entitled to recover of the said defendant the
130 sum of $3,068.40, with interest thereon from the 23d Sept., '74, at 10 %. And because none of the said exceptions so offered and made to the opinion and decision of the said referee do appear upon the record of said trial:

Therefore, at the request of said defendant by their said counsel, the said referee hath signed this bill of exceptions according to the statutes in such made and provided, this 25th of May, A. D. 1876.

J. W. RANSOM,
Referee.

131 That afterwards, to wit, on the 19th day of July, 1876, the said referee, pursuant to said statute of Michigan, made his report in writing to this court, and on, to wit, the day and year last aforesaid, filed the same with the clerk thereof, which report is hereby incorporated into and made part of this bill of exceptions, and is in the words and figures following, to wit:

132 UNITED STATES OF AMERICA:

Circuit court of the United States for the sixth circuit and western district of Michigan.

WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY.

To the circuit court of the United States for the 6th circuit and western district of Michigan.

In pursuance of an order of this court made in the above entitled cause, on the 8th day of November, A. D. 1875, by which the same was referred to me as referee therein for trial, I hereby certify and report that on the 7th day of December, A. D. 1875, the parties thereto appeared before me, said plaintiff, by Messrs. Taggart, Simonds & Fletcher, and the said defendant by Messrs. Smith, Hims & Erwin, their attorneys of record therein, and said cause proceeded to trial. That the testimony of the respective parties thereto, and that of the witnesses produced by them, was taken before me under oath from time to time, until the 15 day of December, A. D. 1875, when each party announced to me that they had no further proofs to offer therein; that
133 after hearing the proofs and allegations of the parties, and the arguments of counsel, I have found the facts proven in said cause, and the whole thereof and the law thereon, which said findings of fact and law are hereto subjoined, and are as follows:

UNITED STATES OF AMERICA:

Circuit court of the United States for the 6th circuit and western district of Michigan.

WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY.

I find the following as the facts proven in this case:

1st. The plaintiff at the time of the commencement of this suit, and at the time the several transactions occurred between the plaintiff and defendant constituting the cause of action herein, was a citizen of the State of Ohio, and a resident of the city of Akron, in said State.

2nd. The defendant at the time aforesaid was a manufac-
134 turing corporation organized, existing, and doing business as such, under the laws of the State of Michigan, having its office and conducting its business at the city of Muskegon, within the western district of Michigan. That at such times Lyman G. Mason was the president of said corporation, and Thomas Monroe was the secretary hereof.

3rd. That at the time aforesaid The Big Rapids Improvement and Manufacturing Company was a corporation organized, existing, and doing business as such under the laws of the State of Michigan, with a business office located at Big Rapids, within the western district of said State, and that Stephen Bronson was the vice-president thereof.

4th. That the plaintiff made a contract with said Big Rapids Improvement and Manufacturing Company for the sale by the plaintiff to said last named corporation of certain lands lying in the county of Missaukee, in the State of Michigan, described as follows: The north-
135 east quarter and the north half of the northwest quarter of sec. 18; also the southeast quarter and the northeast quarter of the southwest quarter of section 8; also the west half of the southwest quarter, and the west half of the northwest quarter, and the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section 24, all in township 21 north, of range 7 west, containing six hundred and eighty-one and $\frac{88}{100}$ acres of land, according to the United States survey. That said last named corporation agreed to pay plaintiff for said land the sum of twelve thousand two hundred and seventy-three and $\frac{84}{100}$ dollars, as follows: Three thousand and sixty-eight & $\frac{46}{100}$ dollars on the 1st day of January, A. D. 1875, with interest thereon at ten per cent., and the balance in three equal annual payments, the first annual payment to be made on the 23d day of September, A. D. 1875, with interest from the date of said contract, to be paid on the 23d day of September, in each year, on the whole sum remaining unpaid in each year, at the rate of seven per cent. The date of which said contract was and is the 23d day of September, A. D. 1874; and the principal and interest thereon is payable at The Citizens' Saving and Loan Associa-
136 tion, at Akron, Ohio. That Stephen Bronson, vice-president of said last named corporation, conducted the negotiations which resulted in said contract on behalf of said corporation, and together with Finley D. Brown, the secretary thereof, executed the same on its behalf.

5th. That said contract contained the following provisions: "No timber is to be cut or removed from said lands without the written per-

mission of the first party endorsed on this contract; and that the plaintiff herein was the party of the first part in said contract named, and that said last named corporation was the party of the second part thereto."

6th. That said contract was drawn up at the city of East Saginaw, in said State of Michigan, on the day of the date thereof, but was not executed by the parties thereto until the 24 day of September, A. D. 1874, when it was executed in duplicate at the drug store of one Brown, at the city of Big Rapids, in said State, one of which said duplicates was then retained by said plaintiff, and the other was delivered to said Bronson.

137 7th. That at the time of the execution of said contract said last named corporation through its vice-president and secretary, (Stephen Bronson and Finley D. Brown) also executed and delivered to said plaintiff a mortgage for the sum of $14,750.19 dollars, on lands situate in township 21 north of range 8 west, in said State of Michigan, to secure to said plaintiff the payment of the purchase price thereof, which said lands had been sold by said plaintiff to said last named corporation some time before that time, which said mortgage is hereto annexed and made a part of my findings of facts in this case, and is marked Exhibit G.

8th. That prior to the execution of said contract and on the 17th day of September, A. D. 1874, said Big Rapids Improvement and Manufacturing Company entered into a written contract with said Mason Lumber Company "to cut and deliver to said Mason Lumber Company (defendant in this suit) 4,000,000 feet of 1st class of white pine saw logs from the land covered by said contract and first herein described, and from the lands covered by said mortgage, which said contract for

138 the delivery of said logs was in force between said corporations on said 24 day of September, 1874, and is hereto annexed marked Exhibit D, and is made a part of my finding of facts herein.

9th. That before the execution and delivery by said plaintiff of the contract for the sale of said lands to said Big Rapids Improvement and Manufacturing Company, said Stephen Bronson on behalf of said last named company refused at first to execute the same by reason of the provision therein prohibiting said corporation from cutting timber upon said lands without the written permission of said plaintiff endorsed on said contract. This refusal was at Saginaw and afterwards at Big Rapids. But afterwards having received a letter from Muskegon, said Bronson state' to plaintiff that he had a contract for the delivery of a quantity of logs to said Mason Lumber Company, and would sign the contract as it was, and asked said plaintiff to go with him to Muskegon and see if some arrangement could not be made to secure plaintiff so that plaintiff would permit said lands to be cut. That accordingly said contract was executed and delivered as hereinbefore found and said plaintiff and

139 said Stephen Bronson afterwards and in the afternoon of said 24th day of September, 1874, went from Big Rapids to Muskegon together to see if the said Big Rapids Improvement and Manufacturing Company could make some arrangements with said Mason Lumber Company whereby said plaintiff might be secured in the payment of the purchase price of said lands and be induced to permit the timber to be cut therefrom; the lands herein last above referred to being the same lands described in paragraph 4 of these findings, and the contract referred to in said paragraph is now and hereinafter described as contract A, and is hereunto attached, marked Exhibit A, and made a part of my findings of fact in this case.

10th. That on the morning of the 25th day of September, A. D. 1874, said Stephen Bronson met Lyman G. Mason, of Muskegon, president of said Mason Lumber Company, at the Occidental Hotel, in said Muskegon; introduced said plaintiff to said Mason, made said Mason acquainted with their business there, had a conversation with him and made an appointment to meet him at said Mason Lumber Company's office that morning. That between 9 and 10 o'clock a. m. of that
140 day the plaintiff and said Bronson went to the office of said Mason Lumber Company, and that such negotiations were then and there had between said Bronson on behalf of said Big Rapids Improvement and Manufacturing Company, said Lyman G. Mason on behalf of said Mason Lumber Company and said plaintiff on his own behalf, as resulted in assignment of said contract A by Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company, the guarantee by said Mason Lumber Company of the payment to plaintiff of the several sums of money agreed to be paid to him by the provisions of said contract A, and in permission on the part of said plaintiff to cut timber from the lands described in said contract, by the execution by said corporation and said plaintiff of Exhibit B, which is hereto attached and is hereby made a part of my findings of the facts in the case.

11th. That during such negotiations the said Stephen Bronson produced a plat of the township in which said lands described in contract A is situated, which said lands were represented by yellow and red colors on said plat, upon or near to which said colors are the
141 figures 1,700, 1,800, 1,000, and 1,200. That said Bronson represented said lands to contain 5,700,000 feet of pine timber; but I do not find that said plaintiff made any representations whatever in relation to the quantity of timber on said lands, or that he had any knowledge of the quantity of timber thereon at the time of the execution of Exhibit B. I find that at that time said plaintiff had never seen said lands, and that said Mason Lumber Company was aware of that fact by a communication then made of that fact by said plaintiff to the said president, that all the knowledge which said plaintiff had of the quantity of timber on said lands at the time of the execution of said Exhibit B was an estimate furnished him by his grantor (one Bentley) at the time said plaintiff purchased said lands, which said estimate was 3,900,000 feet, but I do not find that such estimate was before him at that time or that he made any representations in relation thereto. That during such negotiations said plat was on the table in the presence of said Lyman G. Mason, president of said Mason Lumber Company, and in presence of the plaintiff and said Bronson, and was examined by said Mason, but I do not find that the plaintiff's attention was
142 called to the same by either Mason or Bronson, or that plaintiff made any statements or representations to any of the parties present in relation thereto or the figures upon it, or to the quantity of timber these represented to be on said lands. I do find that the plat so produced by said Bronson at said negotiations was a plat delivered to one Miller by said plaintiff, about one year and a half before that time, and that it has not been in plaintiff's possession since such delivery. That at the time of said delivery the estimates of said Bentley before referred to were marked on said lands on said plat, that said plaintiff never changed the same or authorized any change thereof, and had not before seen said plat since its delivery to Miller. I do not find that *that* Miller was the agent of said plaintiff for any purpose whatever, neither do I do find that the representations of Bronson to said

Mason, relative to the quantity of timber on said lands, were made in the hearing of said plaintiff. I do find, however, that at or about the time of the execution of said Exhibit B, said Mason remarked to said plaintiff substantially, that if the timber was there (meaning on the lands) it was all right and the Big Rapids Improvement and Man-
143 ufacturing Company had a good thing, to which said plaintiff replied that judging from Eldred's and Bronson's anxiety to get the lands it must be all right, but that he had never seen said lands. Said plat referred to in this paragraph is hereto annexed marked Exhibit C, and is hereby made a part of my findings of fact.

12th. That after the terms of Exhibit B had been settled and agreed upon, and about the time of the delivery thereof, there was an interview between said Lyman G. Mason and said plaintiff alone concerning the cutting of pine on the lands in township 21 north, of range 8 west, covered by said mortgage (Exhibit G), at which interview said plaintiff informed said Mason of the fact that he (plaintiff) had a mortgage on those lands, and that after the interview a contract was executed by said Mason Lumber Company to said plaintiff, by which said last named company agreed to pay the said plaintiff $2.50 per M on account of said mortgage, and to be applied thereon for all timber it should take from said lands, which said contract was assented to by said Big Rapids Improvement and Manufacturing Company and executed by said Stephen Bronson in its behalf, and is hereto annexed and made a part of my find-
144 ings of fact, and is marked Exhibit F. And I also find that the execution of said Exhibit F was the result of information obtained after his arrival at Muskegon and at the Mason Lumber Company's office on the morning of said 20th day of September, 1874, relative to the existence of the contract D hereinbefore referred. I also find that said Exhibit F has no connection with Exhibit A & B, and found no inducement thereto.

13th. That said Mason Lumber Company received under their said contract, Exhibit D, from the lands covered by said contract A only 1,162,543 feet, leaving standing thereon 74,656 feet, and making in all 1,237,199 feet of merchantable timber thereon; that there was upon said contract A lands a large amount of timber at the time of the execution of said Exhibit B which was rendered unmerchantable by reason of rot, shakes, being hollow, and other defects, amounting, by estimate of witnesses, of from ten to twenty-five per cent. of the whole amount, many of which defects could not be discovered until the timber was cut; that prior to the execution of said contracts A, B and D, and about the 5th day of September, 1874, said Mason Lumber Company had knowledge of
145 the quality of timber on so much of said contract A lands as are situated upon sections 8 and 18 in said township 21–7, but that it had no knowledge of the quantity of timber thereon, or the quantity or quality on section 24, covered by said contract A, except what it derived from said Bronson and said plat C.

14th. That at the time of the commencement of this suit there was due from said Big Rapids Improvement and Manufacturing Company to said plaintiff, and unpaid, on said contract A, the sum of $3,068.46, and interest thereon at ten per cent. from the 23d day of September, 1874, which said sum of money became due on the first day of January, 1875; that said Mason Lumber Company had notice of the non-payment of said sum of money by said Big Rapids Improvement and Manufacturing Company after it became due, and on or before the 13th day of January, 1875, and was requested by said plaintiff to pay the same, which said Mason Lumber Company neglected to do, and produced to said plaintiff

authority from said Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company to pay the same in monthly
146 payments as follows: $1,000, February 10th, 1875; $1,000, March 10th, 1875; $500, April 10th, 1875, and on May 10th, 1875, sufficient to pay the balance with interest from moneys coming to said Big Rapids Improvement and Manufacturing Company from said Mason Lumber Company at those times; that payments were made by said Mason Lumber Company on account of said log contract D after receiving notice of non-payment of plaintiff's demand, amounting to the sum of about $6,000.

147 *Findings of law.*

Upon the foregoing facts found I find the following as the law of the case:

1st. To enable the plaintiff to recover in this action he must show an indebtedness due and unpaid by the Big Rapids Improvement and Manufacturing Company to the plaintiff at the time this suit was brought, and that said defendant has become liable therefor substantially in the manner and form as alleged in the declaration in this cause.

2d. The defendant, if liable, is so by the terms of the contract Exhibit B and such notice thereunder of non-payment by the Big Rapids Improvement and Manufacturing Company as is required by law in such cases.

3d. By Exhibit B the Big Rapids Improvement and Manufacturing Company assigned its interest in contract A to the defendant in consideration of the guaranty therein contained. The plaintiff assented to that assignment, and gave permission generally to cut the timber on
148 the land described in contract A. It is claimed by defendant that the legal effect of Exhibit B, so far as its liability is concerned, is to postpone the payments provided for in contract A until the 23d of September, 1875; that is, by the terms of said guaranty it agreed to commence paying on the 23d day of September, A. D. 1875, so much as might be then due and unpaid by the Big Rapids Improvement and Manufacturing Company for so much of the land described in said contract A from which the timber had been cut and removed at said date, and consequently that no cause of action existed against it on said guaranty on the 12th day of April, A. D. 1875, the time when this suit was commenced. Will Exhibit B bear that construction? Let us see. By the terms of said paper "The Big Rapids Improvement and Manufacturing Company hereby assigns the contract A, hereto attached, of date September 23d, 1874, between William Buchtel, of Akron, Ohio, and said Big Rapids Improvement and Manufacturing Company; the said Buchtel hereby assenting to the assignment with the understanding that said Mason Lumber Company hereby guarantees the payments as stipulated in said contract, upon which guarantee permission is hereby given to enter upon, and cut, and remove the timber upon
149 the lands described in said contract hereto attached, it being understood and agreed that as fast as the timber is cut and removed from said land, or any part thereof, the purchase price shall be due and payable; that is to say, for all of said land which may be cut before the 23d day of September, 1875, the full purchase price shall be paid on that date." $3,068.46 became due on contract A January 1st, 1875, by its terms. By its terms a like payment became due on the 23d day of September, 1875, on the 23d day of September, 1876, and on the 23d day of September, 1877.

We assent to the rules of construction contained in defendant's request to find—

"The instrument must speak the intention of the parties at the time it was made."

"Regard must be had to the object and whole scope of the instrument."

The construction must be made upon the entire instrument and not merely upon disjointed parts of it.

"General words in an agreement will be qualified by a subsequent special promise unless full effect can be given to the instrument without altering or modifying either."

Applying these rules of construction to Exhibit B, was the
150 payment provided in contract A to be paid on the 1st day of January, 1875, postponed?

By the terms of Exhibit B it will not be claimed that either the Big Rapids Improvement and Manufacturing Company or the defendant were obliged to cut any timber on said lands prior to the 23d day of September, 1875, or at any other time.

Then to what time was the January, 1875, payment postponed (if postponed at all)? Suppose neither of the corporations had cut any timber on said lands prior to the 23d of September, 1875; when, by a proper rule of construction, was the payment due at that time by the terms of contract A payable under the provisions of contract B?

I think the defendant fails in the application of these rules to the construction he claims; the defendant, by executing the instrument, guarantees the payments as stipulated in said contract. The legal import of this expression is that said Big Rapids Improvement and Manufacturing Company shall pay the installments of purchase money provided in contract A as they become due by the terms of that contract.

Effect must be given the provision of the guaranty if possible without destroying other portions of the instrument.

151 Subsequently a provision is found in the instrument which contemplates the cutting of timber upon the lands described in A prior to the 23d day of September, A. D. 1875; possibly it may all be cut before that time, but the guarantor has its option in relation to that. If it chooses to cut the timber or permit it to be cut before that time, in that case the plaintiff's payments are advanced upon his contract by so much in amount as the whole purchase-price bears to the quantity of land cut. If the whole is cut then the plaintiff on the 23d day of September, 1875, would have his right of action upon his guaranty for the whole purchase-price remaining unpaid in case said Big Rapids Improvement and Manufacturing Company should fail to pay the same. This construction supports every provision of the paper and makes the two provisions consistent with each other. I find, therefore, that said sum of $\$3{,}068\frac{46}{100}$ payable by contract A on the 1st day of January, 1875, was due said plaintiff at the time of the commencement of this suit, as against said defendant, if said defendant is otherwise liable.

4th. I find as matter of law under the foregoing facts found in
152 this case that defendant had reasonable notice of non-payment by Big Rapids Improvement and Manufacturing Company of the installment due January 1st, 1875, for the recovery of which this suit is brought. The notice of non-payment was given to defendants as soon as the 13th of January, 1875. What the notice should be or when it should be given is not settled in the case of guarantor, as it is in the case of endorsor, but the reason and justice are the same in both cases

and equally require notice in order that the guarantor may at once take what measures are within his power to secure or indemnify himself."

"The question of reasonable time is a question of law, and the cases are very few which would help us in determining what time would be reasonable; but from the authorities and the reason of the thing to deduce these rules. The guarantor is entitled to the notice, but cannot defend himself by the want of it unless the notice and demand have been so long delayed as to raise the presumption of waiver or of payment, or unless he can show that he has lost by the delay opportunities for obtaining securities which a notice or an earlier notice would have given him." (Parsons on Contracts, 2d vol., pages 28 and 29.)

153 No testimony was offered in this case for the purpose of showing that defendant had lost anything or had been in anywise injured for want of an earlier notice or a seasonable demand. The burthen of proof is upon the defendant to show these facts in order successfully to escape responsibility on his guaranty for want of seasonable notice. In Allen vs. Rightman, 20 Johns R. P., 366, it is determined that an unconditional guarantor of payment is charged as such without any notice whatever. The doctrine above quoted from Parsons on Contracts is substantially endorsed in Lawrence vs. McCalnot, 2 Howard, 186, and in Reynolds vs. Duglass, 12 Peters, 496. I therefore find as a matter of law that the notice of non-payment received by defendant was sufficient to charge it as a guarantor in this case, and that it is not discharged for want thereof.

5th. It is insisted on behalf of said defendant that there can be no recovery against it in this case, by reason of a variance between the declaration and the proofs at the trial, in this, that the plaintiff counts on a guaranty to pay according to the tenor and effect of the contract guaranteed, whereas the proof is of a guaranty to pay in a man-

154 ner different from the provisions of the contract. The contract of guaranty, Exhibit B, is not set up "in hic verba" in the declaration, but is declared upon according to its legal tenor and effect. The object of the suit as determined from the declaration is to recover the payment on the contract A, due by its terms on the first day of January, 1875. By my construction of the contract of guaranty (Exhibit B) in paragraph 3 of these findings of law, I have determined that the legal tenor and effect of said contract was to guarantee that the payment due by the terms of contract A, January 1st, 1875, should be paid the plaintiff at that time. It was competent for the plaintiff to declare upon that instrument according to its legal tenor and effect, and in my judgment the proofs support the declaration in that particular, and that there is no such variance as will prevent recovery.

6th. The defense in this case on the merits is that the defendant entered into the contract of guaranty upon which plaintiff seeks to recover upon the representations, undertakings, and promises of said plaintiff made at the time said contract was entered into, and as an in-

155 ducement thereto, that said lands mentioned in the declaration in this cause, and described in said contract A, then contained and would yield five millions seven hundred thousand feet board measure of good merchantable pine timber. That said defendant confided in these representations, undertakings, and promises of said plaintiff, and in reliance thereon took an assignment of said contract A from said Big Rapids Improvement and Manufacturing Company and guaranteed the payment therein contained to said plaintiff. It is claimed by the defendant that these representations were false and fraudulent, and that the defendant has suffered great damage in consequence thereof.

A very large amount of testimony has been taken to establish the defense, on the one side, and to controvert it on the other. By my finding of facts, it appears that said land did not at that time contain 5,700,000 feet of merchantable pine, but contained less than one-fourth of that quantity. But I do not find that said plaintiff had any actual knowledge of the quantity of pine on said lands at that time, or that he had ever had any knowledge of the quantity thereon, except an estimate made of the same, made by one Bentley, for his grantor, furnished
156 him at the time he purchased said lands several years before, which estimate placed the amount at 3,700,000 feet. I do not find that said plaintiff made any representations at the time said contract of guaranty was entered into, or at any other time, as an inducement thereto, or for any other purpose to said defendant relating to the quantity of pine on said lands. He entered into the contract A for the sale of the lands without any warranty as to the quantity or quality of timber thereon. No question is raised of that kind; no mention is made of the quantity of pine on the lands in the written agreement containing a guaranty. I have found as a fact, however, that Bronson, vice-president of the Big Rapids Improvement and Manufacturing Company, produced plat C, and that the same was examined by the president of defendant during the negotiations out of which said guaranty and assignment grew, and that it lay on the table in the presence of said Bronson, Mason (president of defendant), and plaintiff; but that plaintiff's attention was not called to said plat, or the figures thereon. I have also found as a fact that, after the terms of said assignment and contract of guar-
157 anty had been agreed upon and settled, and about the time of the execution thereof, said Mason, president of said defendant, remarked to said plaintiff, "If the timber is there it is all right, and the Big Rapids Improvement and Manufacturing Company has a good thing," and that said plaintiff replied, "Judging from the anxiety of Bronson and Eldred to purchase it, I suppose it is all right; I have never seen the lands." Is this such a false representation, or a false suppression of facts within the knowledge of plaintiff, as will avoid the guaranty on the ground of fraud? That C was a plat which had belonged to said plaintiff it is true, one year and a half before that time; at that time he had parted with the possession of it, and had not seen it since. When it went into the possession of Miller, at that time it had on it the estimates of Bentley of the quantity of pine on said land, viz, 3,700,000 feet; plaintiff had made ~~the~~ estimates himself on it, and he had no knowledge upon which to base an estimate. If the plaintiff knew, during said negotiations, that plat C then contained an estimate of 5,700,000 feet of pine on said lands, and defendant was making a contract on such basis, what does it matter unless he had within his own breast knowl-
158 edge at that time that it contained a far less quantity?

There is nothing in the case which shows that plaintiff had any such knowledge. The estimate of quantity which Bentley had given him may not have been in his mind at that time; but if it was, was he under any legal or moral obligations to communicate to defendant, unasked, the opinion of Bentley in relation to the quantity?

The reply of plaintiff to the remark of the president of defendant, that he thought it was a good thing, judging from the anxiety of Eldred and Bronson to purchase the lands indicated to the president, it seems to me that the plaintiff was not then acting upon any knowledge he had himself of the amount of timber thereon. I am of the opinion therefore, under the facts found in this case, that there was no misrepresentation or suppression of facts known to said plaintiff relative to the quantity

of timber on said lands made by said plaintiff, which amounted to a legal fraud upon said defendant in the premises, and avoided said assignment and guaranty.

As a matter of law, upon the whole case upon the foregoing facts found I find that the said plaintiff, William Buchtel, is entitled to judgment therein against said defendant, the Mason Lumber Com-
159 pany, for the sum of three thousand and sixty-eight dollars and forty-six cents, with interest thereon at ten per cent. from the 23d day of September, A. D. 1874, and I hereby render judgment in favor of said plaintiff and against said defendant accordingly; and I further certify and report that, on the 31st day of March, 1876, I notified the attorneys of the respective parties that I would complete this my report on the 6th day of April, 1876, at 10 o'clock a. m. of that day, at my office in the city of Grand Rapids, in said district.

That at the time and place last aforesaid the parties again appeared before me by their respective attorneys, and such proceedings were then and thereafter upon the stipulation of the respective parties through their said attorneys that on the 25th day of May, 1876, at 10 o'clock a. m. of that day, the respective parties, by their attorneys, again appeared before me, and said defendant presented a bill of exceptions to the proceedings on said trial, which said bill of exceptions (after amendments thereto proposed by said plaintiff) was settled and signed by me at the request of said defendant, and is hereto attached and made a part of my report.

160 That at the same time and place the said defendant, by its attorneys, requested me to find, as matter of law, as follows:

"Under all the testimony in this case I find, as matter of law, that the plaintiff is not entitled to recover, and defendant is entitled to a judgment of no cause of action. There is no evidence tending to maintain a cause of action against the defendant. As there is no testimony in the case showing that the defendant corporation had ever authorized Lyman G. Mason after the execution of Exhibit B, and had ever ratified any such promise, if any was made; therefore, such promise could not be binding on defendant."

Which said several requests to find as aforesaid were each and every of them then and there refused by me. To which said refusal the said defendant, by his counsel, did then and there except; and I further certify and report that I have spent eighty-four hours in the trial, argument, and consideration of said cause, making fourteen days of six hours each, and that my fees therefore amount to the sum of $140.00.

Dated June 26th, 1876.

J. W. RANSOM,
Referee.

161 $125.00.

Rec'd of Taggart, Simonds & Fletcher, att'ys for pl'ff, one hundred and twenty-five dollars, to apply on my fees.

June 19th, 1876.

J. W. RANSOM,
Referee.

162 This contract made the 23d day of September, in the year one thousand eight hundred and seventy-four, between Wm. Buchtel, of Akron, Ohio, party of the first party, and the Big Rapids Improvement and Manufacturing Company, of Big Rapids, Mich., party of the second part, witnesseth as follows, to wit:

I. The party of the first part, for himself, heirs, executors, and admin-

istrators, agrees to sell the said party of the second part all those certain pieces or parcels of land situate, lying, and being in the county of Missaukee, in the State of Michigan, which are known and described as follows, to wit: The northeast quarter and the north half of the northwest quarter of section eighteen (18); also, the southeast quarter and the northeast quarter of the southwest quarter of section eight (8); also, the west half of the southwest quarter and the west half of the northwest quarter; and the southeast quarter of the northwest quarter; and the southwest quarter of the northeast quarter of section twenty-four (24), all in township twenty-one (21) north, of range seven (7) west, containing six hundred and eighty-one & $\frac{88}{100}$ acres according to United States survey, be the same more or less.

163 II. The said party of the second part, for itself and successors and assigns, agrees to pay to the said party of the first part for the said lands the sum of twelve thousand two hundred and seventy-three & $\frac{84}{100}$ dollars, as follows: Three thousand and sixty-eight & $\frac{46}{100}$ dollars on the first day of January next, with interest thereon at ten per cent., and the balance in three equal annual payments, the first annual payment to be made on the 23d day of September, A. D. 1875, with the interest from the date thereof, to be paid on the 23d day of September in each year, on the whole sum remaining due or unpaid in each year at the rate of 7 per centum; and the said party of the second part shall also pay and discharge all taxes and assessments of whatever name or character, imposed on said premises, or upon this contract from and after the 23d day of September, A. D. 1874, whether ordinary, extraordinary, or for revenue purposes, both said principal and interest payable at The Citizens' Saving and Loan Association in Akron, Ohio.

III. Forthwith after the full payment of said purchase money, taxes, and interest as aforesaid, the party of the first part agrees to
164 execute or cause to be executed to the party of the second part a good and sufficient warranty deed for the said lands so as to convey the same in fee simple, free from encumbrances, to said party of the second part, subject, however, to all taxes, assessments, and liens or titles, thereunder accrued or levied after the date hereof, and subject also to all liens or transfers made by the party of the second part, its successor or assigns.

IV. In case default shall be made by the party of the second part, its successors, or assigns, in any of the conditions above stipulated to be performed by it, it shall and may be lawful for the party of the first part, if he see fit, to declare this contract void and to re-enter upon said the premises at any time after such default without serving on the party of the second part or other person holding under it a notice to quit said land.

And in case this contract shall be so declared void, the party of the second part shall thenceforth be deemed a mere tenant under the said party of the first part, and be liable to be proceeded against without notice to quit under the provisions of an act regulating proceed-
165 ings in case of forcible entry and detainer, and the acts amending the same; and the party of the first part in such case shall be at liberty to sell the said land to any person or persons whomsoever, without being liable in law or equity to the party of the second part or any person claiming under it for any damage in consequence of such sale, or to return any payment made on account of this contract; and payments that shall have been made may be held by the party of the first part as stipulated damages for the non performance of this contract; and said first party

shall have a right to recover all damages sustained by the reason of the holding over of said second party without permission; and it is hereby expressly understood, declared, and agreed by and between the parties hereto that time is and shall be deemed and taken as the very essence of this contract; and all courts shall so construe the same; and that unless the same shall in all respects be complied with by said party of the second part at the respective times and in the manner herein specified and declared; said party of the second part shall lose and be debarred from all rights, remedies, or actions, either in law or equity, upon or under this contract, and no waiver of time or manner of performance
166 shall be implied nor alleged to excuse a failure unless such waiver shall be in writing and signed by the party of the first part, or his agent, lawfully authorized. No timber is to be cut removed from said lands without the written permission of first party endorsed on this contract.

It is also expressly agreed, that as often as any proceedings shall be taken by said party of the first part, either at law or in equity, to cancel this contract or regain possession of said premises, said party of the second part shall pay to said party of the first part the sum of one hundred dollars as a reasonable attorney's or solicitor's fee, in addition to all other legal costs, whether such proceedings shall terminate in the recovery of the possession of said premises by said first party, or the cancellation of this contract, or be sooner stayed by payment or otherwise.

And it is further expressly agreed that in case default shall be made by the party of the second part in any of the conditions stipulated to be performed by it, and the party of the first part shall see fit to declare this contract void, such declaration may be made by a brief no-
167 tice thereof, addressed to the party of the second part at Big Rapids, Mich., and deposited in the post-office in Akron, Ohio, with legal postage prepaid, and this shall constitute good and sufficient notice and service thereof.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written. Second party executes by its vice president, Stephen Bronson, and its secretary, Finley D. Brown, who by its articles of association are authorized to execute such instruments.

WILLIAM BUCHTEL. [L. S.]
BIG RAPIDS IMP. & M'F'G CO. [L. S.]
STEPHEN BRONSON, *V. Prest.*

Attest:
F. D. BROWN, *Sec'y.*
In presence of—
C. H. MILLER.
C. A. STICKNEY.
Exhibit A of pl'ff's proofs.—J. W. Ransom, referee.

168 *Exhibit B of pl'ff's proofs.—J. W. Ransom, referee.*

MUSKEGON, MICH., *Sept.* 25, 1874.

In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, by the Big Rapids Imp. & Man'f'g Co., and for other valuable considerations, the Big Rapids Man'f'g Co. hereby assigns the contract hereto attached of date Sept. 23d, 1874, between William Buchtel, of Akron, Ohio, and said Big Rapids Imp. & Man'f'g Co. The

said Buchtel hereby assenting to this assignment with the understanding that said Mason Lumber Co. hereby guarantees the payments as stipulated in said contract upon which guarantee permission is hereby given to enter upon, cut and remove the timber upon the lands described in said contract hereto attached. It being understood and agreed that as fast as the timber is cut and removed from said land or any part thereof the purchase price shall be due and payable; that is to say, for all said land which may be cut before the 23d day of Sept., 1875, the full purchase price shall be paid on that date.

BIG RAPIDS IMP. & MAN'F'G CO.
S. BRONSON, *V. Pres't.*
WILLIAM BUCHTEL.
MASON LUMBER CO.,
THOMAS MONROE, *Sec'y.*

{ MASON LUMBER COMPANY SEAL. }

169 *Exhibit G of pl'ff proof.—J. W. Ransom, referee.*

This indenture, made this twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-four, between the Big Rapids Improvement & Manufacturing Company, of Big Rapids, Mecosta Co., Mich., of the first part, and William Buchtel, of Akron, Ohio, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of fourteen thousand seven hundred and fifty dollars and ten cents to it in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, enfeoffed and confirmed, and by these presents does grant, bargain, sell, remise, release, enfeoff and confirm unto the said party of the second part, and to his heirs and assigns forever, all of the following described lands situated in the county of Missaukee, in the State of Michigan, to wit: The N. fr'c. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, NE. frac. $\frac{1}{4}$ of NW. fr'c. $\frac{1}{4}$ of sec. 2, town 21 N., range 8 west; and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, & SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of sec. 4, town 21 N., range 8 west; and SW. $\frac{1}{4}$ & S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ & NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of sec. 16, town 21 N., range 8 west; and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, & NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, & N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, & SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of sec. 22, town 21 N., range 8 west, according to U. S. survey, containing 819$\frac{45}{100}$ acres, be the same more or less.

Together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the above bargained premises unto the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever; and the said party of the first part, for itself and for its successors, does cove-
170 nant, grant, bargain and agree to and with the said party of the second part, heirs and assigns, that at the time of the ensealing and delivery of these presents it is well seized of said premises in fee simple; that they are free from all encumbrances and charges whatever, and that it will and its successors and assigns shall forever warrant and defend the same against all lawful claims whatsoever, except a trust deed and log contract herein mentioned. Provided always, and these presents are upon the express condition, that if said party of the first part shall and do well and truly pay, or cause to paid to the said party of the second part the sum of fourteen thousand seven hundred and fifty & $\frac{10}{100}$ dollars and interest thereon as follows, to wit, $3,687.52, and interest thereon at ten per cent. from July 29th last, on the first day of January, 1875, and the balance in three equal annual payments, with annual interest, on the

Company, who, being by me duly sworn, testified that he resided in the city of Big Rapids, in said county; that he is vice-president of the Big Rapids Improvement and Manufacturing Company; that he knows the corporate seal of the said company; that the seal affixed to the within instrument is such corporate seal; that it was so affixed by order of the board of directors of said company, and that he signed his name to the within instrument as vice-president of the said company by the like order.

F. FAIRMAN,
Notary Public, Mecosta County, Mich.

173 Whereas Wm. Buchtel, of Akron, Ohio, has by deed bearing date the 29th of July, 1874, conveyed to the Big Rapids Imp't & Manuf'g Co. the following described lands, viz: The N. ½ of S. E. ¼; the S. ½ of N. W. ¼, and the N. W. ¼ of N. W. ¼ of sec. 22; the S. W. ¼ and S. ½ of S. E. ¼; the N. E. ¼ of S. E. ¼ of sec. 16; the E. ½ of S. E. ¼, and the N. W. ¼ of sec. 4; the east ½ of N. E. ¼; the N. W. ¼ of N. E. ¼, and the N. E. ¼ of the N. W. ¼ of sec. 2—all in township 21 N., R. 8 west; total of 819 acres of land; and the said Big Rapids Imp. & M'f'g Co. has executed a mortgage to the said Buchtel to secure the payment of the purchase price thereof; and the said Big Rapids Imp't & M'f'g Co. has contracted to deliver to the said Mason Lumber Company a quantity of pine saw logs, to be cut from said lands above described: Now, therefore, it is understood and agreed by and between the said Buchtel and the said Mason Lumber Co., that for the saw-logs which the said Big Rapids Imp't & M'f'g Co. shall deliver from said described lands on and in accordance with said contract, which bears date Sept'r 17, '74, the said Mason Lumber Co. shall reserve from the pay'ts which may hereafter become due from said Mason Lumber Co. to said Big Rapids
174 Imp't & M'f'g Co. on said contract between them, to the amount of two & $\frac{50}{100}$ dollars pr. M feet, board measure, and pay the same to said Buchtel on or before the 23d day of September, 1875, as in full payment for any and all claims on the said timber, for so many logs as they may receive from said Big Rapids Imp't & M'f'g Co. on said contract, cut from lands above described.

The said Big Rapids Imp. & M'f'g Co. hereby agrees and subscribes to the above understanding, such payments to be applied by said Buchtel on said mortgage; and the said Buchtel, pursuant to the foregoing written understanding, hereby grants and permits to the said Big Rapids Imp't & M'f'g Co. and the said Mason Lumber Co. the right to immediately enter upon, cut, and remove the timber from said lands.

Dated at Muskegon, Sept. 25th, 1874.

WILLIAM BUCHTEL.
BIG RAPIDS IMP'T & M'F'G CO.,
By S. BRONSON, *V. Pres't.*
MASON LUMBER CO.
THOMAS MONROE, *Sec'y.*

Exhibit "F" of pl'ffs' proofs—J. W. Ransom, referee.

176 This agreement, made and entered into at the city of Muskegon, Muskegon County and State of Michigan, this 17th day of September, A. D. 1874, by and between the Big Rapids Improvement and Manufacturing Company, of Big Rapids, Mecosta Co., Michigan, and the Mason Lumber Company of said city of Muskegon, as follows, to wit:

The said Big Rapids Imp't & Mnfg. Co., representing to be the owners of and having the undisputed right to dispose of the timber on the following described pine land, to wit: The NE. ¼ of sec. 18; N. ½ of the NW. ¼ of sec. 18; the SE. ¼ of sec. 8; the NE. ¼ of NW. ¼ of sec. 8; SE. ¼ of SE. ¼ of sec. 4: total, 480 acres, all in town 21 N., R. 7 west: Also N. ½ of SE. ¼, the S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of sec. 22; the SW. ¼ & S. ½ of SE. ¼, the NE. ¼ of SE. ¼ of sec. 16; the E. ½ of SE. ¼, and the NW. ¼ of sec. 4; the E. ½ of NE. ¼, the NW. ¼ of NE. ¼, and the NE. ¼ of NW. ¼ of sec. 2; all in town 21 N., R. 8 west: total, 819 acres in last named town, from a part of which last named lands, i. e., in sections 2, 4 and SW. ¼ of 16, in town 21 N., R. 8 W., the said Big Rapids Imp't & Manuf'g Co. have contracted with Elisha Eldred to sell and deliver two and one-half million feet of timber cut into
177 saw logs. Now the said Big Rapids Imp't and Manuf'g Co. further proposes, and hereby agrees, to sell, cut, haul, and deliver to the said Mason Lumber Co. four million feet, board-measure, or more, of white pine saw logs, to be cut from the timber on the lands described in sections 4, 8 & 18, in township 21 N., R. 7 W., and sections 22, S. ½ and NE. ¼ of SE. ¼ of sec. 16, town 21 N., R. 8 W., and in no case to include any of the timber or lands described as reserved for filling the contract with said Eldred; and should the other lands described yield more than four million feet of logs suitable to the requirements of this contract, the said Big Rapids Imp. & Manuf'g Co. hereby stipulate and agree that the said Mason Lumber Co. shall have the right to them on this contract, should they so elect, at any time prior to the delivering of the four million feet hereby agreed upon to be delivered them. The logs to be delivered under this contract shall all of them be first-class white pine, mainly of timber known as cork or pumpkin pine, to be 18 inches and upwards in diameter at the small end, and of average size, not to require more than three logs to make one thousand feet of sound merchantable lumber. It is also agreed and understood that the
178 timber shall not be cut up into the limbs and tops, and that all logs to be scaled on this contract shall be free from butt-shakes, ring-rots, punk knots, large knots or unsound bulges, and shall be cut into 12, 14, & 16 f't lengths, mostly 16 f't, not varying more two inches, and in no case to be less than one of the above lengths; the understanding being that the logs to be delivered under this contract shall be a strictly number one lot of logs, and shall be delivered by and at the expense of the said Big Rapids Imp. & Manuf'g Co. afloat in the main Muskegon River in time for the main drive on said river in the spring of 1875.

In consideration of the faithful delivery of all the logs as above stipulated, and the performance of the covenants and agreements of the said Big Rapids Imp. & Manuf'g Co., free and clear from any and all liens or claims from or by other parties on or to any of the said logs and timber, the said Mason Lumber Company hereby agree to pay for the said logs at the rate of ten (10) dollars per thousand feet, board-measure, in manner following, to wit: On execution of this contract the sum of thirty-five hundred (3,500) dollars; October 10th, 1874, two thousand (2,000) dollars; November 10th, 1874, three thousand (3,000) dollars; December 10th, 1874, three thousand (3,000) dollars; January 10th,
179 1875, three thousand (3,000) dollars; February 10th, 1875, three thousand (3,000) dollars; March 10th, 1875, twenty-five hundred (2,500) dollars; April 10th, 1875, two thousand (2,000) dollars; May 10th, 1875, two thousand (2,000) dollars; June 10th, 1875, thirty-five hundred (3,500) dollars; July 10th, 1875, thirty-five hundred (3,500) dollars; Au-

The said Big Rapids Imp't & Mnfg. Co., representing to be the owners of and having the undisputed right to dispose of the timber on the following described pine land, to wit: The NE. ¼ of sec. 18; N. ½ of the NW. ¼ of sec. 18; the SE. ¼ of sec. 8; the NE. ¼ of NW. ¼ of sec. 8; SE. ¼ of SE. ¼ of sec. 4: total, 480 acres, all in town 21 N., R. 7 west: Also N. ½ of SE. ¼, the S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of sec. 22; the SW. ¼ & S. ½ of SE. ¼, the NE. ¼ of SE. ¼ of sec. 16; the E. ½ of SE. ¼, and the NW. ¼ of sec. 4; the E. ½ of NE. ¼, the NW. ¼ of NE. ¼, and the NE. ¼ of NW. ¼ of sec. 2; all in town 21 N., R. 8 west: total, 819 acres in last named town, from a part of which last named lands, i. e., in sections 2, 4 and SW. ¼ of 16, in town 21 N., R. 8 W., the said Big Rapids Imp't & Manuf'g Co. have contracted with Elisha Eldred to sell and deliver two and one-half million feet of timber cut into
177 saw logs. Now the said Big Rapids Imp't and Manuf'g Co. further proposes, and hereby agrees, to sell, cut, haul, and deliver to the said Mason Lumber Co. four million feet, board-measure, or more, of white pine saw logs, to be cut from the timber on the lands described in sections 4, 8 & 18, in township 21 N., R. 7 W., and sections 22, S. ½ and NE. ¼ of SE. ¼ of sec. 16, town 21 N., R. 8 W., and in no case to include any of the timber or lands described as reserved for filling the contract with said Eldred; and should the other lands described yield more than four million feet of logs suitable to the requirements of this contract, the said Big Rapids Imp. & Manuf'g Co. hereby stipulate and agree that the said Mason Lumber Co. shall have the right to them on this contract, should they so elect, at any time prior to the delivering of the four million feet hereby agreed upon to be delivered them. The logs to be delivered under this contract shall all of them be first-class white pine, mainly of timber known as cork or pumpkin pine, to be 18 inches and upwards in diameter at the small end, and of average size, not to require more than three logs to make one thousand feet of sound merchantable lumber. It is also agreed and understood that the
178 timber shall not be cut up into the limbs and tops, and that all logs to be scaled on this contract shall be free from butt-shakes, ring-rots, punk knots, large knots or unsound bulges, and shall be cut into 12, 14, & 16 f't lengths, mostly 16 f't, not varying more two inches, and in no case to be less than one of the above lengths; the understanding being that the logs to be delivered under this contract shall be a strictly number one lot of logs, and shall be delivered by and at the expense of the said Big Rapids Imp. & Manuf'g Co. afloat in the main Muskegon River in time for the main drive on said river in the spring of 1875.

In consideration of the faithful delivery of all the logs as above stipulated, and the performance of the covenants and agreements of the said Big Rapids Imp. & Manuf'g Co., free and clear from any and all liens or claims from or by other parties on or to any of the said logs and timber, the said Mason Lumber Company hereby agree to pay for the said logs at the rate of ten (10) dollars per thousand feet, board-measure, in manner following, to wit: On execution of this contract the sum of thirty-five hundred (3,500) dollars; October 10th, 1874, two thousand (2,000) dollars; November 10th, 1874, three thousand (3,000) dollars; December 10th, 1874, three thousand (3,000) dollars; January 10th,
179 1875, three thousand (3,000) dollars; February 10th, 1875, three thousand (3,000) dollars; March 10th, 1875, twenty-five hundred (2,500) dollars; April 10th, 1875, two thousand (2,000) dollars; May 10th, 1875, two thousand (2,000) dollars; June 10th, 1875, thirty-five hundred (3,500) dollars; July 10th, 1875, thirty-five hundred (3,500) dollars; Au-

gust 10th, 1875, three thousand (3,000) dollars; September 10th, 1875, three thousand (3,000) dollars; Octo. 10th, 1875, three thousand (3,000) dollars.

The above and foregoing shall be the basis for payments, provided always that the said Big Rapids Imp. & Manuf'g Co. shall commence without unnecessary delay and continue to prosecute the work under this contract with vigor as fast as shall be necessary to accomplish the delivery of the logs within the time stipulated. The first payment, thirty-five hundred dollars, to be paid by said Mason Lumber Co.'s acceptance for two thousand dollars, payable in sixty days from date. The balance, fifteen hundred dollars, to be paid in like manner as soon as said Big Rapids Imp. & Manuf'g Co. shall produce satisfactory receipts, permit to cut and sell the timber from the lands described, or other evidence that the parties from whom said company purchased the said lands have no lien, claim, or interest whatever in the land or
180 timber described, which shall in any manner effect the said Mason Lumber Co., or make them liable in any manner beyond the conditions of this contract.

Further, if on the maturity of any of the following payments the said Mason Lumber Company shall desire it, the said Big Rapids Imp't & Manuf'g Company shall receive in lieu of the cash the acceptances of said Mason Lumber Co. on thirty or sixty days. The scaling of said logs shall be done by Samuel Tiffany, or some other party to be agreed upon, at the mutual expense of the parties hereto; no charge to be made for boarding the scaler.

It is further agreed on the part of said Big Rapids Imp. & Manuf'g Co. that with the permit to cut above-named lands, and the release from all liens, claims, or future demand from W. H. Buchtel, from whom said company purchased the land described, the said company shall make to said Mason Lumber Company a bill of sale or such other security on the said land or timber as shall secure said Mason Lumber Co. against loss on account of payments and advances made on this contract.

Executed at Muskegon the day and year above written.

BIG RAPIDS IMP. & MAN'F'G CO.,
By S. BRONSON, *V. Pres't.*
MASON LUMBER CO.,
THOMAS MONROE, *Sec'y.*

181 That afterwards, to wit, on the 21st day of July, 1876, the said defendant, in pursuance of said statute, filed with the clerk of this court its exceptions to said report, which exceptions are hereby incorporated into and made part of this bill of exceptions, and are in the words and figures following, to wit:

182 UNITED STATES OF AMERICA.

The circuit court of the United States for the sixth circuit and western district of Michigan.

THE MASON LUMBER CO., DEFENDANT, }
ads.
WILLIAM BUCHTEL, PLAINTIFF. }

And now comes the said defendant, by its attorneys, Smith, Nims & Erwin, and excepts to the findings of law and the many errors therein

made and filed by the referee in his report in this cause on the day of April, A. D. 1876.

1st. In that the said referee in the construction put by him on the so-called guaranty, Exhibit B, in this cause in his 3d finding of law in his said report.

2nd. In that the referee's construction of said Exhibit B makes said instrument create a twofold liability on the part of this defendant of an inconsistent character and one of which liabilities is not supported by any consideration as follows:

A. That it shall pay the payments as they fall due in Exhibit
183 A, supported by the permission given by plaintiff to cut the timber.

B. To pay in full for so much land as may be cut over prior to Sept. 23d, 1875, and the timber removed, supported by no consideration and which is not a part of the liability of the contract guaranteed.

C. That in and by his construction of Exhibit B he makes the liability of the guarantor greater than that of the maker of the original promise.

D. To support his construction he separates the undertaking of the guarantor into two independent liabilities.

E. That the Big Rapids Imp. & M'f'g Co. might be and would be hastened in its payments on contract A, if the timber were cut and removed on or before the 23d of Sept., 1875, by the agreement of plaintiff and defendant.

F. In that he finds the sum of $3,068.46, payable by contract A on the 1st January, 1875, and was due said plaintiff at the time of the commencement of this suit as against said defendant if said defendant is otherwise liable.

3d. In that the referee found the defendant had reasonable
184 notice of the non-payment by the Big Rapids Imp. & M'f'g Co. of the installment due Jan. 1st, 1875, for the recovery of which this action is brought, and that the notice of non-payment received by defendant was sufficient to charge it as a guarantor in this case, and that it is not discharged for want thereof.

A. In that the referee finds as a matter of law that it was not necessary to give the notice of demand and non-payment at the place where the same is made payable.

4th. In that the referee found that there was no variance between the proof and the declaration in this cause on the part of the plaintiff.

In that the plaintiff counts on a guarantee according to its tenor and effect of certain payment in another contract named, and that the proofs support the declaration in that particular.

5th. In that the referee made use of the fact or statement of the defendant Mason, made about the time the assignment and contract of guaranty had been agreed upon and settled, and about the time of the execution thereof, Mason, president of the said defendant remarked to plaintiff, "If the timber is there it is all right, and the Big
185 Rapids Imp. & M'f'g Co. has a good thing to the prejudice of the defendant," when upon the trial of the cause the referee refused to permit said Mason to give the circumstances and facts surrounding such remark or what led to it; and

In that it was error to consider a part of that conversation last above named and refused to permit the whole to be given.

A. In that the referee erred in his application of the law relating to fraud to the facts found by him in his report herein in the 16th finding of law.

6th. In that the referee erred in prescribing his reasons for the finding in the shape of an argument.

7th. In that the referee erred in finding a judgment in favor of the plaintiff in this case.

In that the referee erred in not finding the law and the facts separately as required by the statute.

8th. In that the referee erred in refusing to find upon the following points as material facts in the case as requested by the defendant.

That Exhibit A was assigned to the defendant by the Big Rapids Imp. & M'f'g Co. as security.

186 9th. In that the referee erred in the construction put by him on Exhibits G & F in his finding of facts, in this, that Exhibit F was not given for the purpose assigned by the referee in his finding, to wit, to pay 2.50 per M stumpage on all logs or timber the Mason Lumber Co. should get from the lands named in Exhibit G.

That the said referee erred in not finding as matter of law the following requests of defendants:

1st. Under all the testimony in this case offered as matter of law that the plaintiff is not entitled to recover and defendant is entitled to judgment of no cause of action.

2d. There is no evidence tending to maintain a cause of action against the defendant.

3d. As there is no testimony in the case showing that the defendant corporation had ever authorized Lyman G. Mason after the execution of Exhibit B, and had ever ratified any such promise, if any was made, therefore such promise could not be binding on defendant.

SMITH, NIMS & ERWIN,
Att'ys for Def't.

Filed July 21st, 1876.

187 And afterwards, to wit, on the day of , 1876, the foregoing bill of exceptions, report, and exceptions thereto were duly brought on for hearing before Hon. Solomon L. Withey, one of the judges of this court then holding a session thereof and were argued by the counsel for the respective parties.

And due deliberation having been thereon had, afterwards, to wit, on the 16th day of November, 1876, by the decision and judgment of said court then and there rendered in that behalf, the exceptions contained in said bill of exceptions and each of them, and the exceptions to said report and each of them, were overruled and report confirmed.

To which decision and judgment, overruling said exceptions, the said defendant did then and there except.

And afterwards, to wit, on the 28th day of November, 1876, judgment in favor of the plaintiff and against the defendant was entered on said report for the sum of three thousand six hundred sixty-seven and $\frac{50}{100}$ dollars damages, together with the costs and charges of the suit to be taxed.

188 And inasmuch as the matters and things and exceptions aforesaid do not form part of the record in said cause, the said defendant has made this its bill of exceptions, and prayed that the same be signed and sealed and made part of the record aforesaid; which is accordingly done this eleventh day of April, 1877.

S. L. WITHEY, [SEAL.]
Dist. Judge.

(Indorsed:) United States of America. The circuit court of the United States for the western district of Michigan. The Mason Lumber Company ads. William Buchtell. Bill of exceptions. Filed April 11, '77. C. B. Hinsdill, clerk.

189 The circuit court of the United States, western dist. of Michigan

WILLIAM BUCHTEL } Assumpsit.
vs.
MASON LUMBER CO. }

Motion for new trial decided Feb'y 3d, 1877.

WITHEY, judge:

The referee finds that pl'ff made no misrepresentations and suppressed no facts relative to the quantity of timber which amounted to a legal fraud. He finds that Bronson made representations, and that Buchtel was present, and if it is conceded that the latter heard all that Bronson said, and saw the plat presented by Bronson, on which were figures representing 5,700,000 f't of timber upon the contract lands, and, therefore, silently acquiesced in all Bronson said, still, as the testimony shows, Buchtel had never seen the lands, and, therefore, cannot be charged with a fraudulent representation, however false and fraudulent Bronson's representations may have been.

There was not shown a suppression of truth, much less a suggestion of falsehood by Buchtel. To render Buchtel liable there must have been proof showing that he wilfully deceived or misled defendant into
190 making the guaranty. The evidence and finding of the referee fails to establish the necessary scienter to charge Buchtel with fraud. (1 Smith's Lead. Ca., 7 ed., p't 1, p. 321.)

In the action by defendant upon the case for false representations against Buchtel, he must, in order to maintain it, show Buchtel to have been actually and fraudulently cognizant of the falsehood of his own representations, or to have made the representations fraudulently without belief that it was true. (1 Smith Lead. Ca., 7 ed., p't 1, p. 300, 301, and cases there cited.)

Unless, therefore, Buchtel asserted what was false within his own knowledge, or asserted either recklessly or without any knowledge upon the subject, there would be no fraud which the law considers sufficient to sustain the action.

We have analyzed the findings of the referee and the proofs submitted with his report, willing and disposed to give a new trial, if the case should justify it. But we have no right to grant a new trial unless satisfied that upon the same condition of proofs and facts a new trial would result in a different conclusion than that reached by the referee; that there is some material error in the facts or law of the case. This we have been unable to do. On the contrary, upon the same condition of facts, we should feel compelled to rule substantially as the referee
191 has done upon every material question. We think the facts justified his findings upon the real matters involved.

We do not see any way upon a new trial, upon the same facts, of reducing the amount of recovery. There is no newly discovered evidence, and the judgment must stand. Our discretion is a judicial one only. The mere fact that we see a great hardship to defendant, and, as between man and man, a judgment for an amount which is unjust in view of the

actual value realized by him, this alone will not justify granting a new trial, especially when satisfied that a new trial would not result, in view of the facts and law, in a judgment materially different.

In conclusion, we reach a determination to deny the motion with less regret, in view of plaintiff's offer to file a stipulation remitting the amount of this and the judgment in the second case down to one half the face of the two judgments.

The motion is denied.

(Indorsed:) U. S. circ. c't, west. dist. Mich. William Buchtel vs. Mason Lumber Co. Decision on motion for new trial in the case tried by referee, Feb'y 3d, 1877. Withey, judge.

192 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, Chester B. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true copy of the records and files and all of them in the proceedings of said court in said entitled cause.

And I also certify that the referee's report, exceptions thereto, and bill of exceptions settled and signed by said referee, and contained in the bill of exceptions settled by Hon. S. L. Withey, are and each of them is a true copy, respectively, of the original report, exceptions thereto, and bill of exceptions settled and signed by said referee, and now on file in my office.

Witness my official signature and the seal of said court, in Grand Rapids, this 27th day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] CHESTER B. HINSDILL,
Clerk Circuit Court.

(Indorsement on cover:) No. 273. The Mason Lumber Company, pl'ff in error, vs. William Buchtel. W. Michigan C. C. U. S. Filed 12th October, 1877.

OFFICE SUPREME COURT U. S.
FILED
APR 10 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 273.

THE MASON LUMBER COMPANY,
Plaintiff in Error,
v.
WILLIAM BUCHTEL,
Defendant in Error.

In Error to the Circuit Court of the United States, for the Western District of Michigan.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS,
—(AND)—
POINTS FOR PLAINTIFF IN ERROR.

EMERY A. STORRS,

Counsel for Plaintiff in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 273.

THE MASON LUMBER COMPANY, PLAINTIFF IN ERROR,

—vs.—

WILLIAM BUCHTEL, DEFENDANT IN ERROR.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS,

—(AND)—

POINTS FOR PLAINTIFF IN ERROR.

EMERY A. STORRS,

Counsel for Plaintiff in Error.

CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.

1880.

Statement of the Case.

On the 23d of September, 1874, Buchtel, the defendant in error, contracted to sell to the Big Rapids Improvement and Manufacturing Company, of Big Rapids, Michigan, 681 acres of pine lands, for the sum of $12,273.84, payable as follows: $3,068.46 on the 1st of the following January, and the balance in three equal annual installments from the date of the contract.

The contract prohibited the cutting or removal of timber without the written permission of Buchtel endorsed thereon.

The Big Rapids Company had contracted to cut and deliver to the Mason Lumber Company, the plaintiff in error, the timber on these and other lands, and on September 25, 1874, the contract was assigned in writing by the Improvement and Manufacturing Company to the Mason Lumber Company, which guaranteed the payments stipulated therein, which assignment was assented to in writing by Buchtel, who gave the Mason Lumber Company permission to cut and remove the timber.

It was further agreed between the parties that as fast as the timber was cut and removed from the lands, the purchase price should be due and payable. This assignment was intended merely to secure the Mason Lumber

Company for its guarantee, and it had no beneficial interest in the contract.

Suit was brought in the court below against the Mason Lumber Company for the first installment, and it plead that it was induced to enter into its undertaking by the false and fraudulent representation of the plaintiff, that the lands contained 5,700,000 feet of good merchantable pine timber, whereas, in truth and fact, they did not contain more than 1,500,000 feet, by reason whereof the defendant had sustained damages to the amount of $20,000, which it gave notice it should recoup.

The cause was referred by stipulation to a referee for trial, who settled a bill of exceptions of the proceedings on the trial, and made a written report, to which the defendant filed exceptions in writing in pursuance of the laws of Michigan, which, by the stipulation, was to govern the trial, and these exceptions were overruled by the court, and judgment entered for the plaintiff for $3,667.-50, which is brought here for review.

The substantial question litigated was the fraudulent representation as to the quantity of timber on the lands.

The referee finds, as a matter of fact, that Mr. Bronson, who was the vice-president of the Big Rapids corporation, and represented it throughout the transaction, exhibited to Mr. Mason, of the Mason Lumber Company, in the presence and hearing of Buchtel, a plat of the lands, and represented that they contained 5,700,000 feet of pine timber, and that, as a matter of fact, there was only 1,237,199 feet of merchantable timber thereon.

He also finds that Buchtel had never seen the lands, and that all the knowledge he had of the quantity of

timber was derived from an estimate furnished him by his grantor, showing that the land contained 3,900,000 feet.

His report expressly states that he does NOT find Buchtel's attention was called to the plat, or that he made any statements or representations to any of the parties in relation thereto, or the figures upon it, or the quantity of timber there represented to be on the lands.

Also, that he did NOT find that Bronson's representations to Mason, relative to the quantity of timber, were made in Buchtel's hearing.

As a matter of law the referee found, and in this he was sustained by the court, that it was immaterial whether the representations were true or false, or whether they had induced the defendant's guaranty or not, provided Buchtel was ignorant of their falsity, and was acting in good faith.

The leading question presented upon this record, therefore is, whether a *scienter* is an essential ingredient of a legal fraud.

Another question grows out of the expression "I do not find," frequently occurring in the report with reference to material facts. As for instance: "I do not find "that the representations of Bronson to said Mason, "relative to the quantity of timber on said lands, were "made in the hearing of said plaintiff." And the question is: Is not the report so incomplete upon these material facts, which should have been found positively one way or the other, as to amount to a mis-trial?

A motion was made to dismiss this case because the amount in controversy was less than $5,000, upon which the decision was reserved until the final hearing.

ASSIGNMENT OF ERRORS.

1st. That the referee erred, as did the court, in sustaining him, and overruling the defendant's exception in that behalf, in holding as a matter of law, that if Buchtel knew, during the negotiations, that the plat contained an estimate of 5,700,000 feet of pine timber on said lands, and the defendant was making a contract on that basis, that it did not matter unless he had within his own breast knowledge at that time that it contained a far less quantity.

Record, page 53.

2d. That the referee erred, as did the court, in sustaining him and overruling the defendant's exceptions in that behalf, in holding as a matter of law that under the facts found in the case, there was no such misrepresentation or suppression of facts known to the plaintiff relative to the quantity of timber on said lands made by said plaintiff, which amounted to a legal fraud upon the defendant in the premises, and avoided the assignment and guaranty.

Record, pp. 53 and 54.

3d. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf in holding that knowledge of the falsity of the representations made by the plaintiff was necessary to constitute a fraud.

4th. That the referee erred, as did the court, in sustainining him and overruling the defendant's exception in that behalf in holding that, as a matter of law upon the whole case, the plaintiff was entitled to judgment against the defendant.

Record, p. 54.

5th. That the referee has omitted to find upon facts in issue before him, and essential to support the judgment in this case, but, on the contrary, has expressly reported that he has not found these essential facts.

See 11th Finding of fact, Record, p. 48.
Also 6th " " " " " 52.

6th. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf, in refusing to allow the witness, L. G. Mason, to testify in behalf of the defendant what conversation between him and the plaintiff led him to remark to the plaintiff that the Big Rapids Company had a good thing in this contract; that they had a clear margin of quite an amount of money, although in his 11th finding of facts he relies on this conversation as evidence that the plaintiff was ignorant of the quantity of timber on the lands.

See pages 16, 17 and 49 of Record.

7th. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf, in refusing to allow the witness, Lyman G. Mason, to answer the following question:

Ques. State whether you would have made this contract, Exhibit B, (the guaranty sued on) for the Mason

Lumber Company, had it not been for the representations made by Mr. Buchtel as to the quantity of pine timber on Sections 8, 18 and 24, being 5,700,000 ft. ?

See page 25 of Record.

8th. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf, in refusing to allow Mr. Mason to answer the following question :

Ques. What was the inducement which caused the Mason Lumber Company to execute Exhibit B ?

See page 25 of Record.

9th. That the court erred in overruling the several exceptions of the defendant to the referee's report, and entering judgment for the plaintiff.

LAWS OF MICHIGAN RELATIVE TO REFERENCE TRIALS.

The provisions of the statute of Michigan relating to trials before referees, which by the stipulations of the parties was to govern the trial of this cause, are contained in the second volume of the Compiled Laws of 1871, on pages 1682, 1683, and 1684; and so far as they are material to this case are as follows:

SECTION 5808. Issues joined in any civil action at law, whether of fact or of law, may upon the written consent of the parties filed with the clerk, or upon the oral consent in open court, be referred to such person, or such three persons as may be agreed upon by the parties, or appointed by the Court in case the parties fail to agree.

SECTION 5810. The trial by such referees shall be conducted in the same manner as a trial by the Court. They shall have the same power to administer oaths, to issue process, to compel the attendance of witnesses, to grant continuances, to preserve order or to punish all violations thereof; and if any witness shall fail to attend before such referee or referees, after being duly summoned or subpœnaed according to the practice of the Court, or being present shall refuse to be sworn or to testify, such referee or referees, if in term time, may certify the facts to the Court, or if in vacation to any Judge of the Circuit Court at chambers; and such Court or Judge may thereupon, if the facts certified shall appear to warrant it, punish such witness as for a contempt of Court, in the same manner as the Court could do if the witness had committed such contempt before such Court. When more than one is appointed, they must all meet to hear proofs and arguments, and to deliberate, but decision of the majority shall be regarded as their decision. The Circuit Judge may, by an order under his hand, filed with the clerk, discharge any referee on cause shown by affidavit, and may in like manner fill any vacancy that may occur in their number, or may direct the reference to proceed and be concluded

without filling any such vacancy. He shall in like manner have power, on cause shown, to make an order for expediting the proceedings before referees, and to compel a report, or the signing of a bill of exceptions.

SECTION 5811. The referees shall report to the Court in writing, showing therein the facts found and the conclusions of law separately; and such report may be filed in term time or in vacation, and shall stand as the finding of the Court in term time unless excepted to, and judgment may be entered thereon in the same manner as if the action had been tried by the Court.

SECTION 5812. When the referees shall file their report, the clerk shall without delay give notice thereof in writing to the respective parties or their attorneys, in the manner provided for the services of notices in the Circuit Court, and immediately endorse on said report, under his hand, his certificate of the giving of such notice, and the time when the same was given, which certificate shall have the same effect as evidence as the return of service of an original writ by a sheriff. The other party within ten days after receiving such notice may file with the clerk exceptions in writing to any conclusions of law in such report, and shall serve a copy of such exceptions on the opposite party; and exceptions being filed and served as aforesaid, the case may be noticed for argument before the Court on such exceptions on any day in term, on the same notice as shall be requisite for special motions; but it shall not be necessary for the parties to file exceptions to the report in order to obtain a review of any ruling of the referees embodied in a bill of exceptions settled as provided by the next section.

SECTION 5813. Either party, on the hearing before the referees, shall be entitled to take exceptions to any ruling of the referees, in the same manner as on trial in open Court; and in case exceptions are so taken, the parties respectively shall be notified by the referees of the time and place when and where they will meet to complete their report, at which time they shall be informed of the conclusion of the referees; and the party so excepting may then, or previous to such time as the referees shall then adjourn to, prepare a bill of exceptions, which shall be settled by the referee on such adjourned day, and shall then be an-

nexed to and filed with their report, and a review thereof may be had in the same manner as of exceptions to the report.

SECTION 5814. On the hearing of such bills of exception, or upon exceptions to the report, or both, the Circuit Court may confirm or set aside such report, in whole or in part, and in its discretion refer the cause back to the referees or enter judgment thereon; and in case that judgment shall be entered thereon, error may be brought on such judgment as in other cases — in which case the bill of exceptions, if any, the report, and the exceptions to the report, shall be considered as forming a part of the record in the case, and the finding of facts by the referees shall be treated as a special verdict.

POINTS.

I.

AS TO THE QUESTION OF JURISDICTION.

1. It must appear *affirmatively* from the record that the amount in dispute is below the jurisdictional sum; otherwise the damages claimed in the plea will be taken as indicating the amount.

Gray v. *Blanchard*, 97 U. S., 564.

2. The state of facts from which it appears that the amount in controversy exceeds the jurisdictional amount:

In July, 1874, the Big Rapids Improvement and Manufacturing Company, by Bronson, Vice President, made the first purchase of the plaintiff of certain lands in Township 21, north of range 8 west, as appears in "Further Cross-examination of Buchtel."

Record, page 38, folio 110.

Which lands are described in a subsequent mortgage, which is set out in full, Exhibit G.

Record, page 57.

The deed of conveyance of those lands had been given without security at the time, for the payment of the purchase money. Plaintiff became uneasy, he wanted security, which led to an interview with Bronson at East

Saginaw, at which the following took place on September 23, 1874, as appears by plaintiff's testimony:

"He (Bronson) said he understood that I was dissatisfied with the sale of lands I had made to him. I told him I was, and wanted him to secure me for those lands. He replied he would *if I would sell him these lands* on 21, 7, described in Exhibit A."

Record, page 30, folio 86.

The mortgage which plaintiff wanted is Exhibit G, and was then drafted, but Bronson would not sign it until the contract Exhibit A was drawn. Then when Exhibit A was drawn, "*he refused to sign it with the clause in it "prohibiting the cutting of timber.*" It was drawn up under my instructions.

Record, page 30, folios 86, 87.

Plaintiff and Bronson then went to Big Rapids, and on September 24, 1874, Bronson again wanted that clause stricken out. "*I told him no, unless he would secure me he "could cut no timber.*" He then wanted me to go with him to Muskegon and see Mason about a contract for logs—"*that Mason wanted to make a contract for logs.*"

Record, page 31, folio 88.

"Before going to Muskegon, Bronson told me if I would go, maybe he could make arrangements to secure me, and I could give him permit to cut timber on the A lands."

Record, page 31, folio 88.

The plaintiff met Mason on September 25, 1874, at Muskegon, and then informed him of his business there.

"I then stated to Mr. Mason that he perhaps was aware that I had sold to Bronson some lands, or the Improvement Co., and that he was anxious to cut them, and wished me to go down to see whether there

could be any arrangement made whereby *I could give him permission to cut.*"

Record, page 31, folio 89.

Plaintiff was already informed of a contract—or negotiations—between Bronson and Mason to cut this timber in Exhibit A, as early as September 22, 1874.

Record, page 33, folio 95.

And prior to this, on September 17, 1874, Bronson had concluded a contract with Mason "to sell, cut, haul "and deliver to the said Mason Lumber Company," the timber from these lands in Exhibit A.

Record, page 60, Exhibit F.
" " 61, folio 177.

Knowing of this contract, and contemplating inducing defendant by reason thereof, to guarantee the payments in Exhibit A, plaintiff, on September 24, 1874, at Big Rapids, before going to Muskegon, executed Exhibit A, *conditionally.* It was not considered to be completely executed "till we got through with Mr. Mason," and had succeeded in inducing the defendant to execute Exhibit B.

Record, pages 28 top, and 31, top.
See Exhibit A, Id., page 54, folio 162.

Plaintiff was seeking to induce the defendant to guarantee payment of *the entire consideration* of Exhibit A, *and not of one installment merely.*

In order to accomplish this, the plaintiff falsely represented to the defendant, as claimed by defendant's plea, notice and proofs, that the lands contained 5,700,000 feet of good, merchantable pine timber.

See plea and notice, Record, pages 8, 9.
Proof Id., page 16, folio 46.
Id., page 17, folios 49, 50.
Id., page 22, folios 62, 64.

The guarantee which the plaintiff thereby obtained from defendant is Exhibit B.

Record, page 56, folio 168.

And the defendant also took an assignment of Exhibit A.

That the representation was untrue in fact, to the knowledge of the plaintiff and Bronson. See

Record, page 40, folios 115, 116.

For the quantity of timber, which was 1,162,543 feet, on the lands in Exhibit A. See

Record, page 18, folio 50, at close.
Testimony of Tiffany, Id., page 29, folio 82.

The referee finds that there was cut and left standing in all, 1,237,199 feet.

Record, page 49, folio 144.

The entire shortage was about 4,537,457 feet.

Of the quantity represented to be on the land, 4,000,000 feet should have been No. 1 logs. The actual product of No. 1 logs was 815,000 feet, being a deficiency of 3,185,000 feet of No. 1 logs, of which the defendant lost the benefit—at least to the sum of $2.00 per thousand feet—amounting to $6,370.00.

Record, page 20, folios 56, 57.

The price at which plaintiff sold the lands in Exhibit A, with the supposed amount of 5,700,000 feet of good

merchantable pine timber was $12,273.84, which is likewise evidence of the value of the timber at a little over $2.00 per thousand feet, showing defendant's damage on account of the deficiency, the same as above.

Thus the notice with the defendant's plea, which claimed $20,000 damages, and the proofs equally show an amount in controversy exceeding the jurisdictional amount of $5,000.00.

3. The plaintiff sues for a *single* installment of the consideration of Exhibit A, and counts upon defendant's guarantee of *the entire consideration.*

By the defense set up it appears that the guarantee was obtained by a false and fraudulent representation, which representation is an entire, indivisible thing, and the damages are entire.

As the plaintiff sues upon an entire thing to recover but a part of it, the defendaut has a right to interpose a defense that goes to the entirety.

But the counsel for the defendant in error insists that defendant below cannot have a judgment for damages in excess of the installment sued on, and they rely on the Wisconsin cases cited in their brief, 42 Wis., pages 488 and 622.

Those, indeed, are cases of suit to recover an installment on a contract where the defense was misrepresentations, which affected the contract as an entirety. The neglect was in the trial court, which did not require a surrender of the outstanding notes as a condition of recovery. But that question was not in the record in error,

and the court did not decide it. See close of the opinions, 42 Wis., pages 492 and 625.

By the modern law of recoupment in cases of fraudulent representations, where the contract cannot be rescinded *in toto* because of the property having perished or been appropriated before discovering the fraud, the contract is deemed to be *affirmed only for what it is worth.*

Withers v. *Green*, 9 How., 213.
Van Buren v. *Digges*, 11 Id., 461.

And in suit between the parties—the one for the price, the other for damages—their conflicting claims should be adjusted on equitable principles, to avoid circuity of action, and to do complete justice.

There is a natural equity, recognized by the civil law under the name of compensation, and incorporated into our modern law of recoupment, *especially as to claims arising out of the same transaction*, that one claim should compensate the other, and that *the balance only should be recovered.*

The Michigan statute of recoupment is founded in this manifest equity, and carries the remedy to the same extent as in the law of set-off, thereby making the defense of recoupment a counter suit to every intent and purpose.

The statute is as follows:

"(5802.) The People of the State of Michigan enact, That in any action in any court, if the defendant shall claim damages by way of recoupment by plea or otherwise, in pursuance of the rules and practice of such court, and on the trial of the issue formed, if the jury or court trying the same shall find such defendant entitled to an amount of damages, whether liquidated or not, greater than the amount

of the demand of the plaintiff, the court shall give judgment according to the true right thereof for the defendant, for the amount of such excess so found and costs, and issue execution therefor against the plaintiff as in cases of judgment and execution on plea or notice of set-off."

The remedy upon such counter claim is not other or different than is presented by an independent suit. And the defense to such counter claim is the same in extent and effect as if presented in an independent suit.

Rawley v. *Woodruff*, 2 Lan., (N. Y.) 419.

Where the vendee, who has been induced to contract by the false and fraudulent representations of the other party, brings suit for the fraud and deceit, *the other party may recoup the unpaid price.*

Avery v. *Brown*, 31 Conn., 398.

On page 401, the court say:

"And so where the buyer, not having paid the purchase money, sues the seller upon his part of the contract regarding the quality or value of the property, the price of it remaining unpaid should in the same manner be deducted from the plaintiff's damages. Thus complete justice is effected in one suit, and without the expenses and delays of two.

"And the propriety of the application of the principle thus illustrated to a case where one of the parties has been induced by the fraudulent misrepresentations of the other to assume the obligation on which the suit is brought, is even more strikingly apparent."

So that the plaintiff below may abate, in whole or in part, the defendant's damages for the fraud, by recoupment on his part of the unpaid purchase money, and enable the court to "give judgment according to the true "right thereof" for the party justly entitled—as required by the statute of Michigan.

4. Buchtel afterwards began suit against the Lumber Company for the other installments due under the contract. That cause has been removed into this court, and is Number 274.

It appears from that record (pages 22–79) that the record and judgment in the first suit were introduced in evidence by the plaintiff as *res adjudicata* of the questions therein involved, and under the rulings of the court the defendant was prevented from making its defense on that trial on the ground of fraud.

The result of Buchtel's claims in the two suits, if allowed, is that the Lumber Company cannot recoup in the first its damages beyond his claim, because it has paid nothing, nor can it recoup at all in the second, because the first judgment is *res adjudicata*, while he is permitted to recover judgment for the *full* contract price.

5. A point is made that the counsel for the defendant below requested that a judgment of no cause of action be rendered, and it is claimed that this is a waiver of the right to recoup.

This request had no reference to the defense on the merits, but related solely to a contention before the referee that there could be no recovery, because the suit had been prematurely brought, also that there had been no notice of non-payment, and that there was a variance between pleadings and proofs.

Record, pages 50, 51 and 52.

Having disposed of this objection, the referee proceeds in his next finding to state and discuss the defense *on the merits.*

It clearly appears from his findings (page 52) that there were several points insisted on in the defense, aside from the question of fraud.

And that the request was intended to apply only to the points above mentioned.

II.

The contract sued upon was entered into by the plaintiffs in error, upon the representation of the defendant that there was 5,700,000 feet of timber upon the land.

This representation was false.

For the damages resulting from this misrepresentation, the defendant in error is liable, whether at the time they were made he knew them to be false or not.

The contract sued upon was induced by these representations, and the defendant in error cannot be excused on the ground that he injured the plaintiff in error by an unintentional untruth.

Smith v. *Richards*, 13 Peters, 36.
Warner v. *Daniels*, 1 Wood & M., 107.
Mason v. *Crosby*, 1 Wood & M., 356.
Smith v. *Babcock*, 2 Wood & M., 257–260.
Bebee v. *Young*, 14 Mich., 138.
Detroit v. *Webber*, 26 Mich., 288.
Tong v. *Marvin*, 15 Mich., 60.
Lockeridge v. *Foster*, 4 Scam., 573.
Patterson v. *Lyttle*, 1 Jones, Penn., 53.
Evans v. *Edmonds*, 13 C. B., 777.
Pidduck v. *Barker*, 3 B. C., 605.
Converse v. *Blumrick*, 14 Mich., 123.

A. THE FACTS ACTUALLY FOUND BY THE REFEREE BRING THE CASE CLEARLY WITHIN THE LEGAL PRINCIPLE STATED.

He finds, without qualification or reserve, the following facts:

1. That on the 25th day of September, 1874, the defendant in error, Mr. Mason, and Gen. Bronson went together to the office of the Mason Lumber Company.
   6th Finding, Record, p. 48.

2. "That such negotiations were then and there had between said Bronson, on behalf of the Big Rapids Improvement and Manufacturing Company, said Lyman G. Mason, on behalf of said Mason Lumber Company, and said plaintiff on his own behalf, as resulted in assignment of said Contract 'A,' by Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company, the guaranty by said Mason Lumber Company of the payment to plaintiff of the several sums of money agreed to be paid to him by the provisions of said contract 'A.'"
   10th Finding, Record, p. 48.

3. *That during such negotiation* Bronson produced a plat of the lands, and on which were the figures 1,700, 1,800, 1,000 and 1,200, and represented the lands to contain 5,700,000 feet of pine timber.
   11th Finding, Record, p. 48.

4. That during such negotiation said plat was on the table in the presence of Mason, Bronson and Buchtel, and *was examined by Mason.*
   11th Finding, Record, p. 48.

5. That there were in fact on said lands in all only 1,237,199 feet of merchantable timber at the time said contract was executed.

11th Finding, Record, p. 49.

B. THE LEGAL CONCLUSION REACHED BY THE REFEREE IS IN DIRECT CONFICT WITH THE PRINCIPLE STATED.

He says, (*6th Finding of Law*, Record, pp. 53 and 54):

"I am of the opinion, therefore, under the facts found in this case, that there was no misrepresentation or suppression of facts *known to said plaintiff*, relative to the quantity of timber on said lands made by said plaintiff *which amounted to a legal fraud* upon said defendant, and avoided said assignment and guaranty."

Again, in the *sixth* finding of law, in referring to the representation made by the plaintiff as to the anxiety of Bronson and Eldred to buy the lands, he says:

"Is this such a false representation, such a false suppression of facts *within the knowledge of the plaintiff*, as will avoid the guaranty on the ground of fraud?"

Again, in the same finding of law, after mixing in as a matter of fact that the estimates on the plat were originally 3,700,000 feet, he says:

"If the plaintiff knew, during said negotiations, that Plat C contained an estimate of 5,700,000 feet of pine on said lands, and defendant was making a contract on such basis, *what does it matter unless he had within his own breast knowledge at that time that it contained a far less quantity? There is nothing in the case which shows that plaintiff had any such knowledge.* The estimate of quantity which Bentley had given him may not have been in his mind at that time. But if it was, was he *under any legal or moral obligation to communicate* to defendant, unasked, the opinion of Bentley in relation to the quantity?"

From these extracts from the report it is perfectly clear, that without attempting to determine the question whether the defendant in error did in fact make the representations alleged, or did remain silent when they were made, the referee considered those facts immaterial, because he holds that the simple consideration that if made, they were made in ignorance of the facts, relieves the plaintiff from all responsibility. In other words, the referee decides in practical effect that the defendant in error is not responsible for the damages which the plaintiff in error suffered by reason of those representations, not because he did not make them, but because they were not knowingly false.

This is not the law, and herein is the fatal error of the report.

C. THE DEFENDANT IN ERROR CANNOT ESCAPE RESPONSIBILITY FOR THE REPRESENTATIONS MADE AS TO THE QUANTITY OF TIMBER UPON THE LAND, ON THE ASSUMPTION THAT THEY WERE ACTUALLY MADE BY BRONSON.

Buchtel well knew that the Mason Lumber Company was under no obligation to guarantee the performance of contracts made by the Big Rapids Improvement and Manufacturing Company.

He knew that the sole consideration for that guaranty was the quantity of timber upon the land covered by the contract of that company with him.

He took part in the negotiations on "his own behalf." Bronson and Buchtel were interested in a common

purpose, to wit, to secure from the plaintiff in error the guaranty of the contract between them.

Buchtel reaped all the advantages and benefits resulting from the false representations made in his presence, and in his interest by Bronson, and must be held responsible for the consequences.

D. THE EFFORT OF THE REFEREE TO RELIEVE THE DEFENDANT IN ERROR FROM RESPONSIBILITY FOR THE FALSE REPRESENTATIONS WHICH INDUCED THE GUARANTY, ON THE SCORE OF BUCHTEL'S IGNORANCE, IS INCONSISTENT WITH THE FACTS AS ACTUALLY FOUND BY HIM.

The referee makes Buchtel a party to the contract, representing and acting for himself and on his own behalf, sets him in the same room and at the same table with Mason and Bronson, makes him a participant in all the negotiations and conversations which finally resulted in the contract, places the false and fraudulent plat on the table before him—finds that he sees it—and yet undertakes to screen him from responsibility by declaring that he does not find that he heard the conversation in which he took a part as an interested party, or that he knew what was on his own plat which laid before him, at which he looked, and the nature of which was made the subject of discussion in his presence, and in bringing about a contract which he, within an hour afterwards, on his own behalf executed.

The law will not permit ignorance so convenient, and blindness so accommodating as this, particularly where voluntary ignorance and blindness commands a premium

to be paid by a party who knew what was going on about him and was sufficiently diligent to see and to know what was lying before his eyes.

These simple facts which the Referee has found, cannot be stripped of their legal attributes by a graciously given ignorance, deafness, dumbness and blindness. Buchtel was not speechless, for the Referee finds that he did say something; he was not altogether stolid in his ignorance, for he did know enough of what was transpiring in his presence to insist upon certain conditions in his contract, and to execute it when these conditions were inserted in it; he was not deaf, for the Referee finds that he did hear what Mason said to him. In short the Referee finds that he saw all that his own interest required him to see, he heard whenever and whatever his interests required him to hear, he could speak whenever speech could save him or make him a dollar. This pretended ignorance is a fraud and ought to be denounced as such.

Buchtel did his fair share of the talking, we may be assured. He heard all that Bronson said, we may be confident. His good motives, which the Referee conveniently finds, are too deep down in the heart for ordinary judicial agencies to reach. The law does not make the effort, but dispensing with a discussion dangerously metaphysical in its character, denounces the transaction as a legal fraud.

III.

THE FINDINGS ARE SO ENTIRELY INCONSISTENT THAT NO JUDGMENT BASED UPON THE REPORT CAN BE SUSTAINED.

1. The Referee finds that the defendant in error was present and took part in all the negotiations resulting in the contract.

YET

He distinctly finds that he made none of the representations on which the contract was based.

2. Finding that the defendant in error was present at and took part in the negotiations—finding that during those negotiations and as a part of them, Bronson represented that there were 5,700,000 feet of timber on the land;

YET

He says he does not find that those representations, made in defendant in error's *presence*, were made in his *hearing*.

3. He finds that the plat was on the table in defendant in error's presence during the negotiations—used as a part of those negotiations—that he saw the plat—

YET

He says he does not find that the defendant in error knew what was the character of the plat exhibited, discussed and examined in his presence and hearing.

It is impossible that Buchtel should have been pres-

ent at the negotiations, acting for himself, and not have known in what those negotiations consisted.

It is impossible that Bronson should, as a part of those negotiations to which Buchtel was a party, have made representations in his *presence* and not in his *hearing*.

It is impossible that a plat should have been exhibited, examined and discussed in his presence, without his knowing what the plat represented.

Being a party to the contracts in which those negotiations resulted, the law conclusively presumes:

That he knew what the negotiations were.

The law conclusively presumes that he heard representations made in his presence and in his interest, and on thestrength of which the contracts were made, and the benefit of which he has reaped.

The law conclusively presumes that he was cognizant of the nature and character of documents exhibited and discussed in his presence, and on which he as well as the other parties to the negotiations acted.

The declaration of a referee that he does not find that he heard and saw what the law made it his duty to hear and see, is a legal absurdity closely bordering on dishonesty, and will not be tolerated.

Buchtel had no right to stop his own ears so that he should not hear, nor close his own eyes so that he could not see.

What the law would not permit Buchtel to do for himself, it will not permit a super-serviceable and too willing referee to do for him.

Even then, if it be assumed that the report in declaring "I do not find" certain facts is to be treated as equivalent to saying "I do find those facts do not exist," it cannot be sustained, for the manifest reason that a party to a contract, present and participating in the negotiations which led to it, is bound to heed, to hear and know what those negotiations were, and is therefore conclusively presumed to have heard and known them.

IV.

But the expression "I do not find," etc., is not to be construed as a finding of the opposite.

1. This is apparent from the situation in which Buchtel is placed as an active participant in the negotiations which ripened into the execution of the contracts to which he was a party.

2. It is apparent from the extracts from his report which I have already quoted, which expressly treats the questions as to whether Buchtel made the representations or heard them made and assented to them, as open questions left in doubt, which the referee did not undertake to decide, because he did not consider their decision necessary.

To all of which our answer is:

That being present at, and having had full and complete opportunities for hearing all the negotiations and representations, out of which the contracts to which he

was a party grew, the law will not suffer him to thus voluntarily remain ignorant, to the damage of innocent parties with whom he was contracting.

V.

If these findings in their present shape are all taken together to be treated as leaving the question whether Buchtel made or assented to these representations undisposed of and undetermined, then the judgment cannot stand, for until those questions are decided one way or the other, there can be no basis upon which to rest a legal conclusion. A failure by a referee to find one way or the other a material fact, is a fatal objection.

Meacham v. *Burke*, 54 N. Y., 217.
Buntin v. *Rose*, 16 Ind., 209.
The People v. *Wells*, 8 Mich., 104.
Carroll v. *G. T. R. R.*, 19 Mich., 94.
Buckley v. *G. W. R. W. Co.*, 18 Mich., 127.
Crane v. *Reeder*, 25 Mich., 313.
Harbaugh v. *Cicott*, 33 " 246.

VI.

But the Referee does expressly find that the plat exhibited belonged to the plaintiff; that it originally contained estimates of the quantity of timber on the land, far in excess of the real quantity, to wit: 3,700,000 feet. It is not pretended that Buchtel did not know that the plat exhibited was the one delivered by him to Miller—and yet he at no time made even a pretense, or a hint

that the estimates as then exhibited were larger than the original ones by 2,000,000 feet. This much of information he certainly possessed, and this he did not communicate. This was a fraud.

The rule is well settled, both as to the findings of a Referee and as to special verdicts, that nothing should be left for inference.

Where the question is as to the effect of a judgment as an estoppel, the rule is well settled, that upon the point upon which the estoppel is claimed, THE CONCLUSION MUST BE INEVITABLE, that the precise point has actually been determined.

Freeman on Judg't, p. 223.
Burton v. *Shannon*, 99 Mass., 203.

It is hardly possible to say that the conclusion from this Report, that the Referee found that Buchtel neither made, nor heard, nor assented to the representations as to the quantity of timber on the land, is an inevitable one. He does not so state, and such conclusion is merely an INFERENCE from the expression "I do not find."

In *Wheeler* v. *Hibbard*, 20 John., 294, the Court say, "The principle is sound that the Court can INTEND nothing in a special verdict but what is found by the jury," and in *People* v. *Wells*, 8 Mich., 104, it held that "The Court can add nothing to a special finding or infer any facts which the jury have not inferred and set forth."

In *Buckley* v. *Gt. Western R. W. Co.*, 18 Mich., 127, the Court say, speaking of a special verdict: "We are not permitted to assume any facts not therein stated, or to infer any from those found."

The findings should be so certain, that there is no room for discussion concerning them, and in this case the Referee expressly declares that it was unnecessary in his view of the law, that he should find those particular facts one way or the other.

I submit herewith an analysis of the facts found and not found.

Respectfully submitted.

EMERY A. STORRS,

Counsel for Plaintiff in Error.

THE FINDINGS.

I annex copies from the Referee's Report — so much of the facts found, and the facts not found, as I have deemed it necessary to discuss on the argument of this motion.

FACTS FOUND. — FINDINGS OF FACT.

10th Finding of Fact.

That between 9 and 10 o'clock, A. M., of that day, the plaintiff and said Bronson went to the office of said Mason Lumber Company, and that such negotiations were then and there had between said Bronson, on behalf of said Big Rapids Improvement and Manufacturing Company, said Lyman G. Mason, on behalf of said Mason Lumber Company, and said plaintiff, on his own behalf, as resulted in the assignment of said contract "*A*," by said Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company, the guaranty by said Mason Lumber Company of the payment to plaintiff of the several sums of money agreed to be paid to him by the provisions of said contract "*A*," and in permission on the part of said plaintiff to cut the timber from the lands described in said contract, by the execution by said corporations of exhibit "*B*," which is hereto attached, and is hereby made a part of my findings of fact in this case.

Record, page 48.

11th Finding of Fact.

That during such negotiations, the said Stephen Bronson produced a plat of the township in which said lands described in contract "*A*" were situated, which said lands were represented by yellow and red colors on said plat, upon or near to which said colors are the figures 1,700, 1,800, 1,000 1,200.

That said Bronson represented said lands to contain 5,700,000 feet of pine timber.

* * * * * * * *

I find that at that time said plaintiff had never seen said lands, and that said Mason Lumber Company was aware of that fact, by a communication then made of that fact by said plaintiff to its said president. That all the knowledge which said plaintiff had of the quantity of timber on said lands at the time of the execution of exhibit "*B*," was an estimate furnished him by his grantee (one Bentley), at the time said plaintiff purchased said lands, which said estimate was 3,700,000 feet.

* * * * * * * *

That during such negotiations, said plat was on the table in the presence of said Lyman G. Mason (President of said Mason Lumber Company), and in presence of the plaintiff and said Bronson, and was examined by said Mason.

* * * * * * * *

I do find that the plat so produced by said Bronson at said negotiations was a plat delivered to one Miller, by said plaintiff, about one year and a half before that time, and that it has not been in plaintiff's possession since such delivery. That at the time of such delivery, the estimates of said Bentley, before referred to, were marked on said lands on said plat. That said plaintiff never changed the same, or authorized any change thereof, and had not before seen said plat since its delivery to Miller.

I do find, however, that at or about the execution of said exhibit "*B*," said Mason remarked to said plaintiff, substantially, that if the timber was there (meaning on the lands), it was all right, and the Big Rapids Improvement and Manufacturing Company had a good thing. To which said plaintiff replied, that, judging from Eldred and Bronson's anxiety to get the lands, it must be all right, but that he had never seen said lands.

Record, pages 48 and 49.

FACTS FOUND IN FINDINGS OF LAW.

6th Finding of Law.

He (plaintiff), entered into contract "*A*," for the sale of the lands without warranty as to quantity or quality of timber thereon. No question is raised of that kind. No mention is made of the quantity of pine on the lands, in the written agreement containing the guaranty.

I have found as a fact, however, that Bronson, Vice-President of the Big Rapids Improvement and Manufacturing Company, produced plat "*C*," and that the same was examined by the president of the defendant, during the negotiations out of which said guaranty and assignment grew, and that it lay on the table in the presence of said Bronson, Mason (President of defendant), and plaintiff, but that plaintiff's attention was not called to said plat, or the figures thereon.

I have also found as a fact that after the terms of said assignment and contract of guaranty had been agreed upon and settled, and about the time of the execution thereof, said Mason (President of said defendant) remarked to said plaintiff, "If the timber is there it is all right and The Big Rapids Improvement and Manufacturing Company has a good thing," and that said plaintiff replied, "judging from the anxiety of Bronson and Eldred to purchase it, I suppose it is all right; I have never seen the land."

Is this such a false representation or such a false suppression of facts within the knowledge of plaintiff as will avoid the guaranty, on the ground of fraud?

Plat "*C*" was a plat which had belonged to said plaintiff, it is true, one year and a half before that time. At that time he had parted with the possession of it and had not seen it since.

When it went into the possession of Miller at that time, it had on it the estimates of Bentley of the quantity of pine on said lands, viz: 3,700,000 feet.

Plaintiff had made no estimate himself on it, and he had no knowledge on which to base an estimate.

If the plaintiff knew during said negotiations that plat "*C*" then contained an estimate of 5,700,000 feet of pine on said lands, and defendant was making a contract on such basis, what does it matter, unless he had within his own breast knowledge at that time that it contained a far less quantity?

There is nothing in the case which shows that plaintiff had any such knowledge.

The estimate of quantity which Bentley had given him may not have been in his own mind at that time.

But if it was, was he under any legal or moral obligation to communicate to defendant, unasked, the opinion of Bentley in relation to the quantity?

The reply of plaintiff to the remark of the President of defendant, that he thought it was a good thing, judging from the anxiety of Eldred and Bronson to purchase the lands indicated to the President, it seems to me, that the plaintiff was not then acting upon any knowledge he had himself of the amount of timber thereon.

I am of the opinion therefore, under the facts found in this case, that there was no misrepresentation or suppression of facts known to said plaintiff, relative to the quantity of timber on said lands made by said plaintiff, which amounted to a legal fraud upon said defendant in the premises, and avoided said assignment and guaranty.

Record, pages 53 & 54.

FACTS NOT FOUND IN THE FINDINGS OF FACT.

11th Finding of Fact:

But I do not find that said plaintiff made any representations whatever in relation to the quantity of timber on said lands, or that he had any knowledge of the quantity of timber thereon at the time of the execution of exhibit "*B*."

* * * * * * *

But I do not find that such estimate was before him at that time, or that he made any representation in relation thereto.

* * * * * * *

But I do not find that plaintiff's attention was called to the same by either Mason or Bronson, or that plaintiff made any statements or representations to any of the parties present in relation thereto or the figures upon it, or to the quantity of timber then represented to be upon said lands.

* * * * * * *

I do not find that Miller was the agent of said plaintiff for any purpose whatever; neither do I find that the representations of Bronson to said Mason relative to the quantity of timber on said lands, were made in the hearing of said plaintiff.

FACTS NOT FOUND IN FINDINGS OF LAW.

6th Finding of Law:

But I do not find that said plaintiff had any actual knowledge of the quantity of pine on said lands at that time, or that he had ever had any knowledge of the quantity thereon, except on estimate of the same, made by one Bentley for his grantor, furnished him at the time he purchased said lands several years before, which estimate placed the amount at 3,700,000 feet.

I do not find that said plaintiff made any representations at the time said contract of guaranty was entered into, or at any other time, as an inducement thereto, or for any other purpose to said defendant, relating to the quantity of pine on said lands.

Record, page 53.

PHILADELP
BAR
ASSOCIATIO

OFFICE SUPREME COURT U.S.
FILED
APR 16 1880
D. W. MIDDLETON, Clerk

SUPREME COURT

OF THE

UNITED STATES.

NO. 273.

PHILADELPHIA BAR ASSOCIATION

THE MASON LUMBER COMPANY,
Plaintiff in Error.
vs.
WILLIAM BUCHTEL,
Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Michigan.

Brief for Defendant in Error.

SIMONDS & FLETCHER,
Attorneys for Defendant in Error.

M. J. SMILEY,
of Counsel.

EAGLE PRINTING HOUSE—GRAND RAPIDS.

Supreme Court of the United States.

THE MASON LUMBER COMPANY,
Plaintiff in Error,
vs.
WILLIAM BUCHTEL,
Defendant in Error.
No. 273.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

On the 23d day of September, 1874, the defendant in error, of Akron, Ohio, being the owner of certain pine land on sections eight, eighteen and twenty-four, in town twenty-one, north of range seven, west, in Michigan, entered into a contract at Big Rapids, Michigan, bearing date the day and year aforesaid, with the Big Rapids Improvement and Manufacturing Company for the sum of twelve thousand two hundred and seventy-three 84–100 dollars, payable as follows: $3,068.46, January 1st, 1875, with interest thereon at ten per cent., and the balance in three equal annual payments with interest at seven per cent., the first payment to be made September 23th, 1875. See record, page 54, folio 162.

Nothing was paid down at the time of making the contract, and it was provided that no timber should be cut or removed from said land without the written permission of the defendant in error, endorsed on the contract.

On the 25th day of September, A. D. 1874, two days after the execution of the contract, at Muskegon, Michigan, the

plaintiff in error, the defendant in error and the Big Rapids Improvement and Manufacturing Company, entered into a written contract in and by which the Improvement and Manufacturing Company assigned the above contract to the plaintiff in error, with the consent of the defendant in error, who thereby also gave permission to cut the timber on the lands described in the first contract; and the plaintiff in error guaranteed the payments stipulated in the above contract, of which assignment the following is a copy:

MUSKEGON, MICH., Sept. 25th, 1874.

In consideration of the sum of one dollar, the receipt of which is hereby acknowledged by the Big Rapids Imp. & Manuf'g Co., and for other valuable considerations, the Big Rapids Imp. & Manuf'g Co., hereby assign the contract hereunto attached, of date Sept. 23d, 1874, between William Buchtel, of Akron, Ohio, and said Big Rapids Imp. & Manuf'g Co. The said Buchtel hereby assenting to this assignment with the understanding that said Mason Lumber Co. hereby guarantees the payments, as stipulated in said contract, upon which guaranty, permission is hereby given to enter upon, cut and remove the timber upon the lands described in said contract hereto attached.

It being understood and agreed that as fast as the timber is cut and removed from said land, or any part thereof, the purchase price shall be due and payable, that is to say, for all said land which may be cut from before the 23d day of September, 1875, the full purchase price shall be paid on that date.

BIG RAPIDS IMP. & MANUF'G CO.,
S. BRONSON, V. Pres't.
[SEAL.] WILLIAM BUCHTEL,
MASON LUMBER CO.,
THOMAS MONROE, Sec'y.

See Record, page 56, folio 158.

In these contracts the Big Rapids Improvement and Manufacturing Company was represented by Stephen Bronson, its Vice President.

After January 1, 1875, the first payment of $3,068.46, mentioned above, not having been paid, the defendant in error sued the plaintiff in error for that payment, and declared on the contract of guarantee.

The plaintiff in error pleaded the general issue, and gave notice that it should give in evidence, and insist in its defence that the guarantee of the contract to defendant in error, was induced by the representation, undertaking and promise of the defendant in error, that there were 5,700,000 feet of good merchantable pine timber on the lands described in the contract, which representation, undertaking, and promise, were false and fraudulent, in this that there were only 1,500,000 feet of pine on the lands, and that thereby the plaintiff in error had suffered great damage, which it would recoupe against the claim of the defendant in error, to the amount thereof and have the balance certified in its favor.

See record, page 14, folio 38, to page 45, folio 131.

The case was referred by stipulation to Hon. James W. Ransom of Grand Rapids, Michigan, for trial. On the trial before the referee, certain exceptions were taken by the plaintiffs in error, under the practice in Michigan as regulated by the statutes, who afterwards tendered a bill of exceptions which was settled and signed by the referee. See record, page 131.

The referee reported in favor of the defendant in error to the amount of the first payment $3,068.46 and interest thereon at ten per cent. from September 23, 1874. See record, page 45, folio 132.

On the trial before the referee evidence was introduced by the plaintiff in error, tending to show the false and fraudulent representations, undertakings and promises of the defendant in error, alleged in the plea and notice, as the inducement for the guarantee sued upon, but the referee in his report found that there were no false or fraudulent representations, undertakings or promises made by the defendant in

error, relative to the quantity of timber on the land. See record, page 48, folio 141, 142 and 143, page 53, folio 156.

After filing the referee's report, the plaintiff in error filed exceptions to the same. See Record, page 62, folio 182, all of which, with the exceptions settled before the referee, were overruled by the Court below, and a judgment rendered for the defendant in error, for $3,667.50, damages and costs to be taxed.

The Statute of the State of Michigan, relative to recoupment, is as follows:

(2 C. L., Sec. 5,802.)

"The people of the State of Michigan enact, That in any action in any Court, if the defendant shall claim damages by way of recoupment, by plea or otherwise, in pursuance of the rules and practice of such Court, and on trial of the issue formed, if the court or jury trying the same shall find such defendant entitled to an amount of damages, whether liquidated or not, greater than the amount of the demand of the plaintiff, the Court shall give judgment according to the true right thereof for the defendant, for the amount of such excess so found and costs, and issue execution therefor against the plaintiff, as in case of judgment and execution on plea or notice of set-off."

The Statute of Michigan relating to referees, and the duties of referees in making their reports, is as follows:

(2 C.L., Secs. 5,811, 5,812, 5,813, 5,814.)

"The referees shall report to the Court in writing, showing therein the facts found, and the conclusions of law, separately; and such report may be filed in term time or in vacation, and shall stand as the finding of the Court in term time, unless excepted to; and judgment may be entered thereon in the same manner, as if the action had been tried by the Court. (5812.) "When the referees shall file their report, the Clerk shall. without delay, give notice thereof, in writing, to the respective parties, or their attorneys, in the

manner provided for the service of notices in the Circuit Court, and immediately indorse on said report, under his hand, his certificate of the giving of such notice, and the time when the same was given, which certificate shall have the same effect as evidence, as the return of service of an original writ by a Sheriff; and either party, within ten days after receiving such notice, may file with the clerk exceptions in writing to any conclusion of law in such report, and shall serve a copy of such exceptions on the opposite party, and exceptions being filed and served as aforesaid, the case may be noticed for argument before the court, on such exceptions on any day in term, on same notice as shall be requesite for special motions; but it shall not be necessary for the parties to file exceptions to the report, in order to obtain a review of any ruling of the referees embodied in a bill of exceptions, settled as provided by the next section."

(5813).

"Either party, on the hearing before the referees, shall be entitled to take exceptions to any ruling of the referees, in the same manner as on trial in open court, and in case exceptions are so taken, the parties respectively shall be notified by the referees of the time and place when and where they will meet to complete their report, at which time they shall be informed of the conclusions of the referees; and the party so excepting may then, or previous to such time as the referees shall then adjourn to, prepare a bill of exceptions which shall be settled by the referees on such adjourned day, and shall then be annexed to and filed with their report, and a review thereof may be had in the same manner as of exceptions to the report.

(5814.)

"On hearing of such bills of exceptions, or upon exceptions to the report, or both, the Circuit Court may confirm or set aside such report, in whole or in part, and in its discretion refee the case back to the referees, or enter judgment thereon; and in case that judgment shall be entered thereon, error may be brought on such judgment as in other cases, in which case the bill of exceptions, if any, the report and the exceptions to the report, shall be considered as forming a part

of the record in the case, and the finding of facts by the referees fhall be treated as a special verdict."

BRIEF AND ARGUMENT ON HEARING.

1. The counsel for the plaintiff in error in his assignment of errors and also in his argument assumes that the referee has found that the representations made by Bronson and the figures contained in the plat "C" were made with the knowledge and assent of the defendant in error, and he argues that as matter of law, if these representations were made with his knowledge and consent, that the representations thereby became his, and constituted a fraud upon the plaintiff in error, whereas, in fact the finding of the referee negatives the proposition that Buchtel was a party to the representations, regarding the quantity of timber on the lands.

The referee finds substantially that Buchtel had never seen these lands, that he did not pretend to know or represent the amount of timber thereon, and that these facts were expressly communicated to the President of the Mason Lumber Company, before and at the time of execution of the agreement upon which the suit was brought.

Folio 141, 142, 143 and 156.

"The first, second, third and fourth assignments of error are all designed to cover this one point, and they are all based upon this erroneous assumption. If we are correct in this position, the finding of the referee upon these points is a complete answer to the argument of the counsel for the plaintiff in error upon that subject.

2. The plaintiff in error in the fifth assignment makes the point that the finding of the referee is insufficient, and that his statement that he does not find certain facts to exist does not amount to a finding upon the subject.

A fair construction placed upon the finding of the referee will interpret his findings to mean that he finds that no representations were made by Buchtel relating to the quantity of timber upon the lands.

See Record, folio 141, 142.

The referee thus construes his own findings at folio 156. He finds in substance that Bronson made representations, but the evidence does not prove or satisfy him that Buchtel knew of them or assented to them.

In view of the situation of the case, it was not necessary that the referee should expressly find that there were no representations.

The defense set up was an affirmative one. The burden of proving it rested upon the defendant.

The defendant offered all its evidence tending to prove the affirmative of that defense, that evidence was received and considered by the referee, and he says in his finding: I do not find that the plaintiff made the representation as alleged.

This substantially finds that the plaintiff did not make the representations, and acquits him of the alleged fraud. It is a finding that he is not guilty of the alleged wrong.

Suppose that instead of setting up this alleged fraudulent representation as a defense the Mason Lumber Company had brought its action against Buchtel to recover for the alleged fraud, and opon the trial it should offer all its evidence upon the subject, and claim that it had established its case, but the referee in his report should say, although the plaintiff claims there were false representations and has offered his testimony upon that subject, it does not convince me, and I am unable to find and do not find that the plaintiff made the representations as claimed.

Would it be claimed that this finding was insufficient to support a judgment for the defendant, and that the referee had not found a material fact?

We believe the true rule is that where the referee has not found a material fact necessary to support his judgment, the report is insufficient, but that where he fails to find a fact necessary to support a defense or an action, the defense or action must fail. Whatever is not found in a defense is negatived by implication.

Manly vs. Ins. Co., 1 Lansing, 20.
27 How. Pr., 1.

In case the report of the referee is not sufficiently explicit, the remedy is to ask the referee for further finding and to allege exceptions to the report.

Mason vs. School District, 34 Mich. 229.
27 How. Pr. Rep. 1.
Manly vs. Ins. Co. 1, Lansing, 20.

3. The sixth assignment of error relates to the alleged refusal of the referee to allow witness Mason to testify what conversation led him to make the remark that the Big Rapids Company had a good thing in the contract A.

In answer to this alleged error, we say:

1. It was immaterial what led to Mason's making this remark. It was a voluntary statement not called out by either counsel, and occurred in a conversation between him and Buchtel after the terms of the guaranty had been agreed upon.

2. Mason was virtually permitted to answer the question, for he says in folio 49, page 17: "The map was presented and my whole action was based upon the information I got then and there from those two men" (meaning Buchtel and Bronson) "as to the quantity of timber on the lands," and from the review of the evidence of Mason immediately following, it appears all that Mason knew of the quantity of timber on the lands was derived from Buchtel and Bronson on that day, Sept. 25, 1874, and that the representations of Buchtel constitute the sole inducement and consideration of the guaranty so far as Buchtel was concerned, and the referee in his 11th finding of fact, page 49, folio 142, in referring to the remark, does not give it as originally stated by Mason in folio 51, page 18, but with the qualification "that if the timber was there it was all right, and the Big Rapids Improvement and Manufacturing Company had a good thing."

Mason's language as found in his testimony was, "I remarked to Mr. Buchtel and to Mr. Bronson, they were both present, and I think Mr. Munroe was present at the time, that the Big Rapids Improvement Company had a good thing in this contract."

Mason was permitted to state all the conversation and the objection interposed goes to the course of reasoning or the action of Mason's mind in making the remark, rather than to any conversation or the part of any one else which induced him to make it.

The rulings of the referee complained of in the seventh and eighth assignments of error, in refusing to allow Mason to testify as to whether he would have executed Exhibit B, had it not been represented by Buchtel that the quantity of timber on the lands was 5,700,000 feet, and what was the inducement to the execution of Exhibit B, we are correct. It assumed that such representations had been proved, which was not the case. and in any event the ruling did not injure the plaintiff in error, inasmuch as the referee found in his report that Buchtel did not represent 5,700,000 feet of timber to be on the grounds.

If a technical error was committed by the referee it had no effect on the case as against the plaintiff in error, for the reason named.

See Record, page 48, folio 141 and 142.

An error without injury is no cause for reversing a judgment.

Besides, Mason had already testified in substance, that the representations of Buchtel, that 5,700,000 feet of timber was on the land, was the sole inducement and consideration for the guaranty, so far as Buctel was concerned.

See Record, page 17, folie 49 and 50, where Mason testified as follows:

Q. "Who made those representations?"

A. "I think they both did, certainly Mr. Buchtel did not object, did not contradict them, and the map was presented and my whole action based upon the information I got then and there, from those two men, as to the quantity of timber on the lands."

See remarks of referee immediately following the above extract.

5th The ninth assignment of error is general and seems to needno reply.

SIMONDS & FLETCHER.

Attorneys for Defendant in Error.

M. J. SMILEY, of Counsel.